(21,563.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 767.

TEFFT, WELLER & COMPANY, A. & S. HENRY & COMPANY, S. E. HEYMANN & COMPANY, ET AL., APPELLANTS,

vs.

JULIAN MUNSURI.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 5, 1909.

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1 THE UNITED STATES OF AMERICA,
District of Porto Rico, ss:

At a stated term of the District Court of the United States for Porto Rico, within and for the District aforesaid, begun and held at the court-rooms of said Court, in the City of San Juan, on the second Monday of October, being the twelfth day of that month, in the year of our Lord one thousand nine hundred and eight, and of the Independence of the United States of America the one hundred and thirty-third—present, the Honorable Bernard S. Rodey, Judge—among the proceedings had was the rendition of an order in the following case, to wit:

SUCESORES DE JOSÉ HERNAIZ, in Liquidation, Bankrupts.

Be it remembered that heretofore to wit, on the 26th day of September, A. D. 1906, came the Petitioners, by their attorney, and filed their petition to be adjudged bankrupts; which said petition is as follows, to wit:

No. 22.

SUCCESSORES DE JOSÉ HERNAIZ, in Liquidation, Bankrupts.

To the Hon. Bernard S. Rodey, Judge of the District Court of the United States for the District of Porto Rico:

2 The petition of Successores de José Hernaiz, Merchants, in liquidation, composed of José Truebas Munsurís, general partner, and Julian Munsuris y Hernaiz, limited partner, of the City of San Juan in the Island of Porto Rico.

Respectfully represents that they have had their principal place or business for the greater portion of six months next immediately preceding the filing of this petition at San Juan, Porto Rico, within said judicial district; that they owe debts that they are unable to pay in full; that they are willing to surrender all their property for the benefit of their creditors, except such as is exempt by law, and desire to obtain the benefit of the Acts of Congress relating to Bankruptcy.

That the schedule hereto annexed, marked "A," and verified by your petitioner's oath contains a full and true statement of all the debts of said firm and (so far as it is possible to ascertain) the names and places of residence of their creditors, and such further statements concerning said debts as are required by the provisions of said Acts.

That the schedule hereto annexed marked "B," and verified by your petitioner's oath, contains an accurate inventory of all their property, both real and personal, and such further statements concerning said property as are required by the provisions of said Acts:

Wherefore, your petitioners pray that they may be adjudged by the Court to be bankrupts within the purview of said acts.

SUCS. DE JOSÉ HERNAIZ EN LD.
JOSÉ TRUEBA, *Petitioners.*

HENRY F. HORD,
Attorney for Petitioners.

3 UNITED STATES OF AMERICA,
District of Porto Rico, ss:

I, José Truebas Munsuris, one of the petitioning debtors mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true, according to the best of my knowledge, information and belief.

JOSÉ TRUEBA,
Petitioner.

Subscribed and sworn to before me, this 26th day of September, A. D. 1906.

[NOTARY'S SEAL.] JUAN GUZMAN BENITEZ,
Notary Public,
(Official Character).

Order of Adjudication.

(Filed Sept. 26, 1906.)

Bankruptcy of SUCS. DE JOSÉ HERNAIZ, in Liq.

Order.

At San Juan, Porto Rico, in said District on the 26th day of September 1906, before the Honorable Bernard S. Rodey, Judge of said Court in bankruptcy, the voluntary petition of Sucesores de José Hernaiz, in Liquidation, that they be adjudged bankrupts, within the true intent and meaning of the acts of Congress relating to bankruptcy, having been heard and duly considered, the said Sucesores de José Hernaiz, in liquidation, are hereby declared and adjudged to be bankrupts accordingly.

4 And it appearing to the Court that Ed. Maurer, one of the creditors appearing in the schedules presented with said petition, has filed suit in the district court of San Juan, Porto Rico, and has obtained a judgment against said bankrupts and has issued execution on said judgment and caused the same to be levied on the real estate of bankrupts as set out in said schedules and is about to cause the same to be sold; and it further appearing that said judgment was obtained within the four months next preceding the filing of said petition to be adjudged a bankrupt; that said Ed. Maurer is a non-resident of Porto Rico and that his attorney in said cause is Rafael Lopez Landrón, of San Juan, Porto Rico,

Therefore, it is hereby ordered that further proceedings in said cause be stayed and that a copy of this order be forthwith served on

said Rafael Lopez Landrón attorney for said Ed. Maurer, as aforesaid, commanding him to suspend further proceedings on said execution sale and to stand to and abide the further orders of this court of bankruptcy herein.

And it is further ordered that said Rafael Lopez Landrón attorney for said Ed. Maurer, appear herein on Monday, October 1, 1906, to show cause, if any he can, why this order of stay should not be made permanent.

B. S. RODEY, *Judge.*

San Juan, P. R., Sept. 26, 1906.

Order of Reference.

(Filed September 29, 1906.)

In the Matter of Sucs. de José Hernaiz, in Liquidation, Bankrupts.

Whereas Succesors of José Hernaiz, in liquidation, in the
5 District aforesaid, on the 26th day of September, A. D. 1906, were duly adjudged bankrupts upon a petition filed in this court by them on the 26th day of September, A. D. 1906, according to the provisions of the Acts of Congress relating to bankruptcy.

It is thereupon Ordered that said matter be referred to Andrés B. Crósas, one of the Referees in Bankruptcy of this Court, to take further proceedings therein as are required by said Acts; and that the said Sucs. de Hernaiz, in liquidation, shall attend before said Referee on the 12th day of October, at San Juan, and thenceforth shall submit to such orders as may be made by said Referee or by this Court relating to said voluntary bankruptcy.

It is further Ordered that notice to creditors be published in English in the "Porto Rico Review," and in some Spanish paper of general circulation in the Island of Porto Rico.

September 29, 1906, San Juan, P. R.

B. S. RODEY, *Judge.*

In the Matter of Sucesores de José Hernaiz, in Liq., Bankrupt.

List of Debts Proved.

The following is the list of creditors who have proved their debts:

Name.	Residence.	Consideration.	Amount.
Julian Munsuri.....	San Juan, P. R.....	Loan.....	$11719.00
A. & S. Henry & Co.....	Manchester, Eng.....	Merchandise..	£1873 13–9
S. E. Heymann & Co.....	2 Stone St., N. Y.....	" ..	$691.42
Tefft Weller & Co....	326 B'dway, N. Y.....	" ..	10559.30
6 Sherman, Reid & Co. (Sherman & Sons Co.)	64 Leonard St. N. Y...	Merchandise..	542.46
Bernheimer & Walter.....	120 Franklin St. N. Y..	" ..	2473.36
Garner & Co.....	2–16 Worth St. N. Y...	" ..	1218.08
Sweetser, Pembrook & Co..	25 Broad St. N. Y.....	" ..	1700.70
Everett Heaney & Co.....	353–355 Canal St. N. Y.	" ..	1304.12
Grinnell, Willis & Co.....	44–46 Leonard St. N. Y.	" ..	1776.36
Heller & Long.....	78–80 Worth St. N. Y..	" ..	1293.65
Schill, Seebolm & Co	Manchester, Eng.....	" ..	£396–9–0
American Trading Co.....	25 Broad St. N. Y.....	" ..	$1254.90

I certify that the foregoing is a true list of all the claims filed since January 2, 1907, when the last list was certified to the Court.
San Juan, Porto Rico, Oct. 10th, 1907.

ANDRÉS B. CRÓSAS,
Referee in Bankruptcy.

(Filed with Clerk Oct. 12, 1907.)

Motion.

(Filed Oct. 22, 1907.)

In Bankruptcy. No. 22.

In the Matter of SUCESORES DE JOSÉ HERNAIZ, in Liq., Bankrupt.

And now comes Wm. H. Hawkins, as Attorney for various creditors herein, and moves the Court that Julian Munsuri y Hernaiz, who claims to be a special partner in the above firm and as such having only a limited liability, be declared a full or general partner in the said firm, and generally liable to the full extent of his property for the payment of the just debts of the said firm. And further that the said Julian Munsuri be ordered to deliver over to the duly appointed trustee herein, all his property not exempt by law to be administered by this bankruptcy Court for the purposes of paying the debts of the said firm.

WM. H. HAWKINS,
Attorney for Creditors.

7 *Opinion.*

(Filed October 25, 1907.)

In Bankruptcy. No. 22.

In the Matter of SUCESORES DE JOSÉ HERNAIZ, Bankrupts.

Opinion reversing Referee's holding, and reinstating injunction against one of the bankrupts, and holding latter to be a general partner and requiring schedules of his private property to be filed.

This cause has been some time before the Referee in Bankruptcy. It appears that some months ago W. H. Hawkins, Esq., counsel for divers of the creditors, appeared before the Referee and requested him to issue an order against the alleged limited partner Julian Munsuri, requiring the latter to file schedules of his individual property as a general partner in the premises, and further requesting the Referee to issue an order of injunction against the said Munsuri restraining him until the further order of the Court from disposing of any of his private property situated in this district,

and requesting that a cautionary notice in that behalf be issued by the Court to the proper registrar of property. It appears that the Referee granted both of these requests, but failed to record the warning notice in the registry office. It further appears that shortly thereafter the Referee rescinded his action in this behalf, and annulled or attempted to annul his order of injunction, on the ground that he had no jurisdiction of the said Munsuri under the ruling of this Court in the case of Belen Ortiz *et al. vs.* Evaristo Alcala del Olmo *et al.*, decided something like a year ago.

Thereupon, or as soon thereafter as he became aware of this action of the Referee, counsel for the creditors appeared before said
8 Referee and excepted to his action in the premises and petitioned that the matter be certified to the Court for a ruling. Counsel further filed before the Court itself a motion that, on the evidence already introduced before the Referee, Munsuri be declared and be held to be a general, and not a special partner of the bankrupt firm.

On this motion and on the issue raised by the certificate of the Referee, counsel has had a full hearing—no person appearing for Munsuri although parties who represented him before the Referee were duly cited. A transcript of the evidence taken before the Referee, as well as the exhibits introduced, consisting of letter books, papers, ledgers, etc., was duly submitted.

Having thus heard counsel at length, and consulted the statutes of Porto Rico with reference to limited partnerships, and having examined the text books, reports and citations as submitted by counsel, we are constrained to observe and hold:

That the law of Porto Rico as to limited partnerships, as set out in the statute embraced in the commercial code, is practically the rule of limited partnerships as known in France, Spain, Louisiana and other civil law countries and states. That under such law a limited partner is not permitted to interfere unduly in the partnership affairs without subjecting himself to being held liable *in solido*, as a general partner. In this case we find from the evidence, the exhibits, the letters press copy books, etc., as aforesaid, that the bankrupt Munsuri did in fact unduly, and contrary to the Porto Rican statute, interfere in the said alleged limited partnership, and that he was in fact as to the creditors as much a general partner therein as was the duly constituted general partner José Trueba.

Munsuri largely managed the business, bought and sold goods for the firm, went to the States as its purchasing agent, and
9 was in fact the managing and dominating person in connection with it. In truth, we are inclined to believe that the firm name under which the business was conducted, that is "Sucesores de José Hernaiz", was not such a firm name as could be used in such a limited partnership under the Porto Rican law, the letters S. en C. (Sociedad en Comandita) never having been used either on the sign on any of the business places, or on the stationery. Further it appears that at a time when the concern was insolvent, this man Munsuri induced the declaring of a dividend to himself and the said Trueba of almost twenty-five thousand dollars. The

letter books show that Munsuri went to the States in the summer or fall of 1902 and had the general partner write letters to many wholesale houses in New York, all of whom are now creditors as a result of purchases then made. These letters were written under the firm name, referring to him as "our Mr. Julian Munsuri" who was going there to buy goods, etc., "in our name." It appears further that the general partner had no means whatsoever, save what he may have had in the business itself and that this man Munsuri was a comparatively wealthy man in Porto Rico, and the only person whose commercial standing could give any apparent commercial weight to the business in question. We therefore, on the evidence—and it is ample—unhesitatingly hold him to be in law as to creditors liable as a general partner in the concern, and we further hold that he must file schedules of his private property in the premises, as required by the bankrupt act. We further hold that the Referee erred in rescinding his order of injunction aforesaid, and his order rescinding the same will therefore be, and is hereby vacated, and a cautionary notice will at once issue to the proper registry offices, describing the property sought to be bound, in such ample form as may be proper.

10 We are of opinion that the Court has full and complete jurisdiction of the said Julian Munsuri under the bankruptcy act, because the general partner filed the petition as and of the "Sucesores de José Hernaiz, merchants, in liquidation," composed of José Trueba Munsuri, general partner, and Julian Munsuri y Hernaiz, limited partner, and because the said Julian Munsuri y Hernaiz thereafter, through one Wenceslao Bosch thereunto duly empowered in writing to represent him, filed proof before the Referee of a claim in his own favor against said bankrupt concern, amounting to over eleven thousand dollars. Section 5-c of the bankruptcy act, in our opinion, gives the Court this jurisdiction. "The Court of bankruptcy which has jurisdiction of one of the partners, may have jurisdiction of all of the partners and of the administration of the partnership and individual property."

We have ascertained that some years ago this same firm, at the petition of their creditors, were declared involuntary bankrupts in this court, but that for some reason all of the petitioning creditors came into court and consented that the proceeding be dismissed, which was done. We have no knowledge why this was done, nor as to what effect the same may have on the rights, if any, of such creditors before the present Referee, and as to this we express no opinion at the present time.

Proper orders, etc., to make effective the views herein expressed, will be prepared and entered, and will issue as may be proper.

B. S. RODEY, *Judge.*

11 *Order.*

(Filed October 25, 1907.)

In Bankruptcy. No. 22.

In the Matter of SUCESORES DE JOSÉ HERNAIZ, in Liq., Bankrupt.

In accordance with the opinion filed herein this day upon the hearing on the petition of Wm. H. Hawkins, Attorney for the creditors, for a review of the order of the Referee in Bankruptcy, entered on the 27th day of June 1907 vacating the orders of May 14th 1907, Whereby Julian Munsuris was restrained and enjoined from disposing of any of his property and was ordered to file schedules of his individual property, and upon the motion that Julian Munsuris be declared a general partner of the bankrupt firm, it is:

Adjudged and Decreed that the said Julian Munsuris was a general partner in the bankrupt firm of Sucesores de José Hernaiz, and as such liable for the debts of the said firm, and it is:

Ordered, Adjudged and Decreed that the Referee erred in entering the order of June 27th 1907, vacating the said orders of May 14th 1907, the said order of the Referee of June 27th, 1907 is vacated and the action of the said Referee is reversed.

B. S. RODEY, *Judge.*

12 *Order.*

(Filed October 25, 1907.)

In Bankruptcy. No. 22.

In the Matter of SUCESORES DE JOSÉ HERNAIZ, in Liq., Bankrupt.

In accordance with the opinion this day rendered herein, it is:

Ordered that Julian Munsuri, or his agent or agents, be restrained and enjoined, and he, or his agent or agents, is hereby enjoined and restrained from selling, incumbering or in any way disposing of any property real or personal, owned by him or belonging to the bankrupt estate, and it is:

Ordered that the said Julian Munsuri, or any agent or agents having possession of, or control of any of the property real or personal belonging to the said Munsuri, deliver over to the Trustee herein, forthwith all of said property, and it is further:

Ordered that the said Munsuri, his agent or agents, file schedules of debts and inventories of his individual property.

B. S. RODEY, *Judge.*

13 *In re* SUCCESSORS DE JOSÉ HERNAIZ & CO.

In Bankruptcy.

Before Honorable Andrés Crósas, Referee in Bankruptcy.

Petition of Julian Munsuri.

To the Honorable the Referee in the above-entitled matter:

Now comes Julian Munsuri, by his attorney, Willis Sweet, appearing specially for the purposes herein set forth, and for no other purpose, and shows as follows:

14 I.

That at the times hereinafter mentioned, your petitioner claims to have been a special partner of the said firm of Successors of José Hernaiz & Co., now bankrupt, but that as the result of a hearing had in the premises, the Honorable District Court of the United States for Porto Rico, in an opinion handed down on the 14th day of July, 1908, held the petitioner to be a general partner in said firm, and that said Court also held that petitioner, and the private property of petitioner, is subject to the debts and liabilities of said bankrupt firm.

II.

Petitioner shows that at the hearing last referred to, the question of the former settlement and adjudication of all of the claims, or alleged claims, now pending against said bankrupt firm, except the claims of Heller & Long, was by said Honorable District Court reserved, the Honorable Judge, at the time of handing down said opinion expressing a preference for first having said question of settlement and adjudication passed upon by said Honorable Referee, and then having said question certified by said Referee at the instance of whomsoever might feel aggrieved by his decision. And thereupon your petitioner further shows:

III.

That on the 13th day of June, 1903, the mercantile firms of Sweetzer, Pembroke & Co., Sherman, Reid & Co., and the American Trading Company, filed a petition in involuntary bankruptcy against the said firm of Successors de José Hernaiz & Company and its individual members, which petition was granted as to the bankruptcy of said firm, but denied as to the bankruptcy of the individual members thereof, although said petition in bankruptcy was resisted by the members of said firm.

15 IV.

That in the years 1902-3, the said firm Successors de José Hernaiz & Co. were seriously involved in their business, and your petitioner, always regarding himself a special or limited partner

in said firm, borrowed from the Colonial Bank of San Juan, Porto Rico, the sum of $40,000, which amount he loaned to said firm, with the belief that the amount stated would be sufficient to carry said firm through its temporary embarrassments, and enable it to save itself altogether; but that notwithstanding this advance, secured by the personal property, that is to say, the private property, of your petitioner, the said bankrupt proceedings stated in the foregoing paragraph followed.

V.

Your petitioner further shows that he had at that time been in the mercantile business in Porto Rico many years, and that at the time of said bankruptcy, he had, after the custom of Spanish merchants in the colonies of Spain, retired from the active management of the business of said firm, becoming a limited partner therein, and as he supposed and intended, subject to the laws and responsibilities of a special partnership under the Commercial Code of Porto Rico; and your petitioner further shows that during his long business career, he had accumulated valuable property, and that at the time said firm was declared bankrupt, and at the time said properties were seized and the rents thereof sequestrated, he was the owner of Nos. 4 and 17, Cruz St., and No. 32 San Francisco St., all in San Juan, Porto Rico, and now of the value of between $50,000 and $60,000, but subject to the mortgage before referred to, whereof the sum of about $20,000 remains due and payable to said Colonial Bank.

16 VI.

Your petitioner further shows that when said firm was adjudged bankrupt as aforesaid in the year 1903, and it became evident that the assets of said firm would not satisfy the demands made against it, he decided to make if possible a settlement of said indebtedness, out of his private estate, applying as far as they would go the firm assets in returning to him the funds advanced for the purpose of said settlement. Those assets were filed, and all creditors were advised as to their extent, while of course their value was a matter of judgment or opinion.

VII.

The liabilities of the firm amounted at that time, all told, to the sum of $72,978.88, besides the sum of $11,719.11, still due your petitioner on account of the $40,000 loan already mentioned. And thereupon your petitioner began negotiations for the settlement of said liabilities, and did settle the same, all as will appear by the receipts given in the settlement of said accounts. The said receipts are attached, eleven in number, and attached hereto, and marked "Petitioner's Exhibit A." In this manner your petitioner proceeded to settle said accounts, and did settle and adjust the same, including all creditors, except the small claims of Edward Maurer and Heller & Long, both claims amounting in all to the sum of $5,366.37; but the said claim of Maurer being in litigation before the Insular Court, is not involved in the matter at bar.

VIII.

Thus all claims were settled by your petitioner, except the two claims of Maurer and Heller & Long aforesaid, and thereupon, in the year A. D. 1904, your petitioner, having settled all claims against the bankrupt estate, (except the two aforesaid), departed for the Kingdom of Spain, of which kingdom he is a native and
17 subject, and has since resided therein, at the same time leaving at his departure the said property situated in San Juan, and already in this petition described.

IX.

Your petitioner further says that after his departure for Spain, the said Edward Maurer began an action in the District Court of Porto Rico for the District of San Juan, and that litigation was continued for a long period of time, and various attachments were issued, the said litigation being so annoying to the general partner of said firm of Successors of Jose Hernaiz & Co., that he, the said general partner, asked the consent of your petitioner to file a voluntary petition in bankruptcy, thus ending said litigation, with its train of expense and constant annoyance; and your petitioner consented thereto, because said Maurer and said Heller & Long had refused to make any compromise with your petitioner, and your petitioner believed that said proceeding in bankruptcy would be the best and most desirable manner of ending vexatious litigation and definitely closing out the affairs of said bankrupt firm, including the indebtedness to your petitioner.

X.

Accordingly, Jose Trueba, the managing partner of said firm, filed a voluntary petition in bankruptcy on the 26th day of September, 1906. Thereupon, the usual proceedings in Bankruptcy followed; and Wenceslao Bosch, a Spanish lawyer, and Attorney in fact for your petitioner, presented to the Referee the claim of your petitioner for the balance due as aforesaid, and William H. Hawkins, Esq., an attorney of said Court, appeared as the attorney for Heller & Long and presented their claim for $1,293. A trustee was appointed, and then Mr. Hawkins, always having his appear-
18 ance specified as being for Heller & Long, proceeded with a long examination of said Trueba and other witnesses. Little attention was paid to said examination, and from the record of the same there is nothing to indicate that a cancellation of the settlement theretofore made by Julian Munsuri with various creditors was even in contemplation; but on the contrary, there was nothing to indicate what afterwards appears to have been all the time the purpose of counsel for Heller & Long, to wit: To again make claim for all of the debts settled by Munsuri as hereinbefore set forth; and thereupon certain claims against the said bankrupt firm were presented as follows:

List of Creditors.

Julian Munsuri.....	San Juan, P. R.....	Loan		$11,719.00
A. & S. Henry & Co.....	Manchester, Eng.....	Merchandise..		£1,873.13-9
S. E. Heyman & Co.....	2 Stone St. N. Y.....	"	..	691.42
Tefft, Weller & Co.....	326 B'dway N. Y.....	"	..	10,559.30
Sherman, Reid & Co..... (Sherman & Sons Co.)	64 Leonard St. N. Y.....	"	..	542.46
Bernheimer & Walter....	124 Franklin St. N. Y.....	"	..	2,473.36
Garner & Co.....	2-16 Worth St. N. Y	"	..	1,218 08
Sweetzer, Pembroke & Co.	25 Broad St., N. Y	"	..	1,700.70
Everett, Heaney & Co....	353-355 Canal St N. Y....	"	..	1,304.12
Grinnell, Willis & Co	44-46 Leonard St. N. Y...	"	..	1,776.36
Heller & Long.....	73-80 Worth St. N. Y.....	"	..	1,293.65
Schill, Seebohm & Co.....	Manchester, Eng.....	"	..	£396-9-0

Filed with Referee Oct. 19, 1907.
" by " with Clerk Oct. 12, 1907.

All of said claims, except that of Heller & Long, so presented, having been settled by Julian Munsuri in 1903, transferred to him, receipted in full, and by him transferred to said firm Successors of Jose Hernaiz & Co.

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XI.

Thereupon, immediately following said examination, the said attorney for Heller & Long presented said claims above recited, and without service upon Julian Munsuri, personal, or substitute, or at all, said Hawkins asked for an injunction prohibiting the said Munsuri, who is in Spain, or his agents, from disposing of his property, and requiring his said agents to pay all rents received from said property to the Referee in Bankruptcy, which order of injunction, sequestration and seizure of property was granted by said Referee, without any notice of any kind to said Julian Munsuri as aforesaid, although all of said rents and property were the private rents and property of said Julian Munsuri.

XII.

Your petitioner further shows that as soon as he was advised of what had been done in the premises, he employed the firm of Sweet, Rossy & Campillo, the said Sweet being the Willis Sweet who presents this petition, and the said Julian Munsuri being advised by said firm that in their opinion the said Referee was without jurisdiction to make any order whatsoever touching the personal property of said Julian Munsuri, a motion was presented to said Referee by the terms of which it was moved that all of said orders affecting the private property of said Munsuri, and which had been made without service upon or notice to said Munsuri of any kind, be vacated and the said Referee granted said motion; but afterwards the said attorney for said Heller & Long and other alleged creditors, caused the said order of said Referee to be certified to the said Honorable District Court, which Court reversed the order of said Referee and reinstated all of the said orders that had by said Referee been vacated. And thereafter, as soon as the authority of said Julian Munsuri could be obtained so to do, counsel in his behalf appeared

in the said Honorable District Court and the said Court
20 granted a hearing upon a motion made by special appearance to vacate the order of said Court affirming jurisdiction over the person or private property of said Julian Munsuri; and the said District Court did on the said 14th day of July, 1908, hand down its opinion aforesaid, affirming its jurisdiction in the premises over the said private property of said Munsuri.

XIII.

Your petitioner further shows that in the last mentioned motion considered by said Honorable District Court, the attention of said Honorable Court was called to the fact that said Munsuri held the receipts in full, of all of said creditors except Heller & Long, and offered to exhibit the same with a view of ending said litigation at that time and place, but the said Honorable Court, not accepting the views of Counsel as to jurisdiction, the question of a former settlement remained to be considered, which question the said Honorable Court reserved as aforesaid, and indicated its desire, orally, that the Honorable Referee should pass upon the same, even though formally, and that the party feeling aggrieved thereby, should cause the findings of said Referee to be certified to said Honorable Court for review.

XIV.

Your petitioner shows that of the thirty creditors who filed their claims against said bankrupt firm in 1903 as aforesaid the said Julian Munsuri settled with all of said creditors here represented except Heller & Long and he herewith attaches to this petition the complete list of creditors as shown in the bankruptcy proceeding in 1903 which list of creditors with the memorandum of the assignment of their claims to Julian Munsuri is hereto attached and
21 marked "Petitioner's exhibit B," and it will be seen that of the thirty in the said list of creditors represented but eleven have presented claims to this Honorable Referee and as to the said eleven alleged creditors, with the exception of the said Heller & Long, your petitioner here and now exhibits their receipts, showing that their respective claims were in December 1903, settled in full, and the record of said settlement was filed in the United States District Court for Porto Rico in said bankruptcy proceeding on the 7th day of December, 1903, the said list of creditors, with note of said assignment being hereto attached, and marked Petitioner's exhibit "B."

XV.

Your petitioner further shows that said settlement has remained in the files of said Court since the time stated, as appears from the record in said Court, and that the same was in the files of said Court on the 28th day of March, 1904, at which time said action was by the said Honorable District Court for Porto Rico, William H. Holt, presiding, and who had made all of the orders in said cause, duly dismissed, the said order dismissing said cause being hereto attached and marked Petitioner's exhibit "D"; and your petitioner further

shows that since said settlement, no action has been brought nor is any action now pending to cancel, vacate or set aside the said receipts, and your petitioner avers that the same appear to be in full force and effect.

XVI.

Your petitioner further shows that said settlement was made by duly authorized parties representing all concerned, and in absolute good faith, and that all records and facts now presented to this Referee were in existence at the time said settlement was had,
22 and were accessible to all parties interested, and that nothing has occurred or developed since said settlement, or any fact discovered which was not in the possession of or available to all of the parties interested at the time said settlement was effected.

XVII.

Your petitioner respectfully submits that the parties now seeking to avoid said settlement are too late in attempting the same and that your petitioner is advised and believes that he may invoke the principle of laches to stop further annoyance, expense and litigation with reference to said accounts, as well as the former settlement of said claims.

XVIII.

Your petitioner submits that said claims remain adjudicated under the action of dismissal by said Court, and that all claims receipted, have been and are finally settled, and that said order of dismissal was the final legal adjudication of the same; and that especially is this true in the absence of any charge of fraud, deceit, or cheating by which said settlement was carried into effect.

Wherefore, petitioner prays that the orders heretofore made allowing said claims be reconsidered, vacated and set aside, and that said claims be disallowed. That is to say, that the order allowing the claims of A. & S. Henry & Co., S. E. Heyman & Co., Tefft, Weller & Co., Sherman, Reid & Co. (Sherman & Sons Co.), Bernheimer & Walter, Garner & Co., Sweetzer, Pembroke & Co., Grinnell, Willis & Co., Everett, Heaney & Co., and Schill, Seebohm & Co., be reconsidered, vacated and set aside, and that the same be not allowed, because they have been settled.

23 JULIAN MUNSURI,
By WILLIS SWEET,
His Attorney.

Dated San Juan, July 29th, 1908.

UNITED STATES OF AMERICA,
District of Porto Rico, ss:

Willis Sweet, being first duly sworn says: I am the attorney for Julian Munsuri in the above entitled matter, have drawn the foregoing petition and know the contents thereof and I believe the same to be true; the information upon which I base my belief is obtained from the records of the above entitled Court, and the records, orders, testimony and proceedings in said Court or before the Referee in

bankruptcy in the matter of Successors of Jose Hernaiz & Co. in Bankruptcy.

WILLIS SWEET.

Subscribed and sworn to before me this 29th day of July, 1908.

ANDRES B. CROSAS,
Referee in Bankruptcy.

Service accepted by copy this 31 day of July, 1908.

——— ———,
Att'y for Creditors.

Service accepted by copy this 31 day of July, 1908.

——— ———, *Trustee.*

24 PETITIONER'S EXHIBIT "A."

SAN JUAN, P. R., *November 3rd*, 1903.

Received from Sucesores de José Hernaiz & Compañia the sum of $3516.45, in full settlement of the account of Tefft, Weller & Co. against the said firm of Sucesores de José Hernaiz & Compañia.

DEXTER & HORD,
Attorneys for Tefft, Weller & Co.

N. B.—It is understood that the amount set forth in the receipt herein has been paid by Mr. Julian Munsuri, and not by the undersigned, as it is stated thereon by mistake.

San Juan, Porto Rico, dated—*ut supra.*

SUCS. DE JOSÉ HERNAIZ,
pp. JOSÉ DE URREJOLA.

Pay to the order of Succs. of José Hernaiz value received.
Porto Rico, April 18, 1904.

JULIAN DE MUNSURI.

25 SAN JUAN, PORTO RICO, *November 3rd*, 1903.

Received from Sucesores de José Hernaiz & Compañia the sum of $434.94, in full settlement of the account of Everett, Heaney & Co. against the said firm of Sucesores de José Hernaiz & Compañia.

DEXTER & HORD,
Attorneys for Everett, Heaney & Co.

N. B.—It is understood that the amount set forth in the receipt herein has been paid by Mr. Julian Munsuri, and not by the undersigned, as it is stated thereon by mistake.

San Juan Porto Rico, dated—*ut supra*—

SUCCS. DE JOSÉ HERNAIZ,
pp. JOSÉ DE URREJOLA.

Pay to the order of Succs. of José Hernaiz value received.
Porto Rico April 18, 1904.

JULIAN DE MUNSURI.

26 SAN JUAN, PORTO RICO, *November 3rd,* 1903.

Received from Sucesores de José Hernaiz & Compañia the sum of $1700.70, in full settlement of the account of Sweetser, Pembrook & Co. against the said firm of Sucesores de José Hernaiz & Compañia.

WALTER P. WALSH,
Agent for Sweetser, Pensbrook & Co.

N. B.—It is understood that the amount set forth in the receipt herein has been paid by Mr. Julian Munsuri, and not by the undersigned, as it is stated thereon by mistake.

San Juan, Porto Rico, dated—*ut supra*—

SUCCS. DE JOSÉ HERNAIZ,
pp. JOSÉ DE URREJOLA.

Pay to the order of Succs. of José Hernaiz value received.
Porto Rico, April 18, 1904.

JULIAN DE MUNSURI.

27 SAN JUAN, PORTO RICO, *November 3rd,* 1903.

Received from Sucesores de José Hernaiz & Compañia the sum of $406.02, in full settlement of the account of Garner & Co. against the said firm of Sucesores de José Hernaiz & Compañia.

DEXTER & HORD,
Attorneys for Garner & Co.

N. B.—It is understood that the amount set forth in the receipt herein has been paid by Mr. Julian Munsuri, and not by the undersigned, as it is stated thereon by mistake.

San Juan, Porto Rico, dated—*ut supra*—

SUCCS. DE JOSÉ HERNAIZ,
pp. JOSÉ DE URREJOLA.

Pay to the order of Succs. of José Hernaiz value received.
Porto Rico, April 18, 1904.

JULIAN DE MUNSURI.

28 SAN JUAN, PORTO RICO, *November 3rd,* 1903.

Received from Sucesores de José Hernaiz & Compañia the sum of $193.31, in full settlement of the account of S. F. Heyman & Co. against the said firm of Sucesores de José Hernaiz & Compañia.

DEXTER & HORD,
Attorneys for S. F. Heyman & Co.

N. B.—It is understood that the amount set forth in the receipt herein has been paid by Mr. Julian Munsuri, and not by the undersigned, as it is stated thereon by mistake.

San Juan, Porto Rico, dated—*ut supra*—

SUCCS. DE JOSÉ HERNAIZ,
pp. JOSÉ DE URREJOLA.

Pay to the order of Succs. of José Hernaiz value received.
Porto Rico, April 18, 1904.

JULIAN DE MUNSURI.

29 SAN JUAN, PORTO RICO, *November 3rd,* 1903.

Received from Sucesores de José Hernaiz & Compañia the sum of $180.82, in full settlement of the account of Sherman, Reid & Co. against the said firm of Sucesores de José Hernaiz & Compañia.

DEXTER & HORD,
Attorneys for Sherman, Reid & Co.

N. B.—It is understood that the amount set forth in the receipt herein has been paid by Mr. Julian Munsuri, and not by the undersigned, as it is stated thereon by mistake.
San Juan, Porto Rico, dated—*ut supra*—

SUCCS. DE JOSÉ HERNAIZ,
pp. JOSÉ DE URREJOLA.

Pay to the order of Succs. of José Hernaiz value received.
Porto Rico, April 18, 1904.

JULIAN DE MUNSURI.

30 SAN JUAN, PORTO RICO, *December* 2, 1903.

I received from Mr. Julian Munsuri a draft issued by the American Colonial Bank on Muller Schall & Company, of New York, for the sum of Eight hundred and twenty-four dollars and forty-five cents ($824.45) payable to Bernheimer & Walter, New York.
I also received from said Mr. Julian Munsuri the sum of one hundred and fifty dollars ($150.00) balance by account for expenses and fees, as agreed.

F. H. DEXTER.

Pay to the order of Succs. of José Hernaiz value received.
Porto Rico, April 18, 1904.

JULIAN DE MUNSURI.

31 Messrs. Succs. of José Hernaiz, San Juan, in the Account Current with Schill, Seebohm & Co., Ltd.

DEBTOR.		CREDIT.			
1902.		1902.			
Dec. 31. Balance.....		31 Dec. 120...	421	– 11	50250
1903.		1903.			
April 25. Interests 6 %.....		30 April.....	8	6 1	
			£429	7 –	50.520

1903.		1903.				
April 25.	Balance.....	30 April.....	429	7	–	
1903.		1903.				
April 25.	Balance of nos....	30 April.....				50.520
"	" on new acc't	" "	429	7		
			£429	7	–	50.520

S. E. ú O.—
Manchester, April 25, '03.

SCHILL, SEEBOHM & CO., LMT.
(Character unknown) *Director.*

In our capacity as representatives of Messrs. Schill, Seebohm & Co. Ltd. of Manchester, for this case, we pass over and transfer in their name and to Mr. Julian Munsuri all their rights, interest and actions on the claim herein.

San Juan, Porto Rico, June 25, 1903.

SANTISTEBAN, CHAVARRI & CO.

Pay to the order of Succs. of José Hernaiz value received.
Porto Rico, April 18, 1904. JULIAN DE MUNSURI.

32 Messrs. the Succs. of José Hernaiz, San Juan, Pto. Rico, in a/ct. Current with A. & S. Henry & Co., Ltd.

Dr.

1902.		Interest to 30th April, 1903.				
Nov. 15.	Balce. of A/ct. rendered cash 30th Nov. '02.	£2,508	11	10		
	151 days' interest to 30th April 1903.....	51	17	11		
1903.						
April 30th.	Postages etc. to date.....				2	8
	Dr. Balc. Cash 30th April 1903.....	£2,560	12	5		

E. E.
Manchester, 30th April, 1903.

A. & S. HENRY & CO., LIMITED.
A. E. RUTHWELL, *Director.*

E. E.
Manchester, 30th April, 1903.

A. & S. HENRY & CO., LIMITED.
A. E. RUTHWELL, *Director.*

As attorney- in fact of Messrs. A. & S. Henry & Co., Limited, of Manchester, we pass over and transfer to Mr. Julian Munsuri all of our rights, interest and actions on the claim herein, without assuming further responsibility on the matter either as to ourselves or as to our principals.

San Juan, P. R., June —, 1903.

JOSÉ SANTISTEBAN.
ANTO MARTIAL.

Pay to the order of Succs. of José Hernaiz value received.
Porto Rico, April 18, 1904. JULIAN DE MUNSURI.

33 479.

NEW YORK, *Feb.* 3, 1904.

M. Suc. de José Hernaiz Co., San Juan, P. R., to Grinnell, Willis & Co., 44 & 46 Leonard Street.

Payable in New York City Funds.

1902.		
Dec. 8.	2/Feb. 8	$20.12
" 8.	To mdse. 2/Feb. 8	11.44
"	Freight and Insurance	3.15
20.	2/Feb. 20	149.33
1903.		
Jan. 19.	Freight & Insurance	9.62
3.	2/M'ch 6	473.93
"	Freight & Insurance	15.82
17.	2/M'ch 20	148.01
31.	" Apr. 3	623.37
"	Freight & Insurance	20.05
Feb. 14.	2/Apr. 17	183.
" "	" "	218.58
14.	Freight & Insurance	9.62
		$1,886.04

CR.

1902.		
June 6.	Allowance	4.52
		1,881.52

Certified correct.

GRINNELL, WILLIS & CO.

Subscribed and sworn to before me this 4th day of February 1904.

MAX COHEN,
Notary Public.
(Characters unknown.)

Being properly authorized for this act I transfer this claim to Mr. Julian Munsuri.
San Juan, P. R., February 26, 1904.

LW. J. TEXIDOR.

Pay to the order of Sucs. of José Hernaiz value received.
Porto Rico, April 18, 1904.

JULIAN DE MUNSURI.

34 Messrs. Succs. de José Hernaiz, San Juan, in the Account Current with American Trading Company.

		Debtor.	Credit.		
1903.					
January	1.	The account up to date.....	1249 28	181	37 68
	23.	As per invoice by the "Phila."	116 58	158	3 08
March	10.	" " " "Coamo."	117 10	112	2 18
	13.	Charge.....	1 98	109	03
June	1.	Invoice of Jan. 9, '03	239 07	172	6 85
	30.	Postage	25		
	30.	Interest at 6%	47 64		
			$1771 90		$49 82
1903.					
June	30.	Balance	$1654.80		
1903.					
June	12.	Our credit March 13	117 10	112	2 18
	30.	Balance of interest.....			47 64
	30.	" " new account.....	1654 80		
			$1771 90		$49 82

—— ——. (Character unknown.)

N. B.—It is understood that the amount set forth in the receipt herein has been paid by Mr. Julian Munsuri, and not by the undersigned, as it is stated thereon by mistake.

San Juan, Porto Rico, dated—*ut supra*—

SUCCS. OF JOSÉ HERNAIZ,
pp. JOSÉ URREJOLA.

New York, Julio 1, de 1903, (unknown) S. E. ú O. American Trading Co.

(Character unknown.)
—— ——, *Vice-President.*

Pay to the order of Succs. of José Hernaiz value received.
Porto Rico, 18 April, 1904.

JULIAN DE MUNSURI.

35 *List of Creditors.*

		Assigned to Munsuri.
Heirs of Vicente Juan, of Palma de Mayorca, Spain.	$297.00	"
Jaffe & Sonss, Manchester, England.....	19.34	"
Stavert, Sigomala & Co. " "	9,606 41	"
A. & S. Henry & Co. " "	12,542.75	"
Schill, Seebohm & Co. " "	2,105.23	"
Azemard & Leonard, Paris, France.....	2,163.62	"
Isidro Gassol & Son, Barcelona, Spain.....	3,780.11	"
S. E. Heyman & Co , New York.....	922.54	"
Graciano Mestre, Utuado, Porto Rico.....	66.64	"
José Llona, Arecibo, Porto Rico.	99.40	"
Ramón Fernandez, Ciales, Porto Rico.....	51.38	"
Smith, Hogg & Co., New York.....	68.63	"

		Assigned to Munsuri.
Bernheimer & Walter, New York	3,295.56	"
Garner & Co., New York	1,624.10	"
Sweetzer, Pembroke & Co., New York	3,401.40	"
Sherman, Reid & Co., New York	723.28	"
American Trading Co., New York	1,606.00	"
Tefft, Weller & Co., New York	14,174.27	"
Everett, Heaney & Co., New York	1,746.91	"
José María Peña, San Juan, P. R.	15.00	"
Sucs. de Castañer, Yauco, P. R.	21.76	"
Francisco Cadierno, Arecibo, P. R.	233.57	"
Julian Munsuri, San Juan, P. R.	16,819.86	Money loaned.
Banco Español, Puerto Rico	5,174.00	
Manuel Aguilar, Cadiz Vejez, Spain	1,240.88	
Heller & Long, New York	1,293.37	
Grinnels, Willis & Co., New York	2,326.71	
Ed. Maurer, New York	4,073.67	
Dumarest & Co.	2.65	
Miguel Arsuaga, Barceloneta, P. R.	429.23	
Total	$89,898.47	

Filed Dec. 7, 1903.

36 From the Bankruptcy Journal, U. S. District Court for Porto Rico.

Entry Under Date of March 28, 1904.

In Bankruptcy.

SWEETZER, PEMBROKE & CO.

vs.

SUCCESSORS DE JOSÉ HERNAIZ & COMPANY.

This cause coming on for hearing, defendants Successors de José Hernaiz & Co. appeared by their solicitor N. B. K. Pettingill and Ed. Maurer and Heller & Long by Joseph Anderson, Jr. and Rafael Guillermety and thereupon said creditors through their solicitors Joseph Anderson, Jr., and Rafael Guillermety filed a stipulation withdrawing the opposition to the dismissal of the insolvency petition and it appearing that notice has been sent to all the creditors of Successors de José Hernaiz & Co. of the motion to dismiss this proceeding, it is now so ordered and the case is dismissed.

37 *Report.*

(Filed Oct. 15, 1908.)

Bankruptcy. No. 22.

In the Matter of SUCESORES DE JOSÉ HERNAIZ, Bankrupts.

Report and Finding of Referee on Motion for Disallowance of Claims.

To me, the undersigned, one of the Referees in Bankruptcy of this court, to whom was referred the above cause in bankruptcy,
38 was presented a motion by Julian Munsuri in the course of the proceedings in this cause for the reconsideration and dis-

allowance of the claims of A. & S. Henry & Co., S. E. Heyman & Co., Tefft Weller & Co., Sherman, Reid & Co., (Sherman & Sons Co.), Bernheimer & Walter, Garner & Co., Sweetser, Pembroke & Co., Everett Heaney & Co., Grinnell, Willis & Co., Schill, Seebolm & Co., and American Trading Co., all of which were filed before me and allowed May 13 1907; and in support of said motion were filed receipts from all the said creditors except A. & S. Henry & Co., Grinnell, Willis & Co., and Schill, Seebolm & Co. An assignment of their debts from these last three was filed.

The parties appeared before me by their attorneys and witnesses were examined and testimony taken, and now being fully informed and having the briefs for and against said motion before me, I make the following findings of fact and conclusions of law:

Findings of Fact.

I.

The firm of Sucesores de José Hernaiz was formed on May 13, 1895, with Julian Munsuri as a special partner and José Trueba and Isidor Llona as general partners; Llona withdrew in 1897 and the firm continued with Trueba as the only general partner and with Munsuri as special partner down until 1904. Munsuri had prior to 1895 been a general partner in a firm having the same name, Sucesores de José Hernaiz, and Trueba, his nephew, had been a clerk in that firm.

II.

Through all of the books of account of the firm, except the last ledger opened April 30, 1902, and the journal opened the February previous, have been destroyed, still by these last books it is
39 seen that an inventory was taken and that the capital of the firm on April 30, 1902, was $48,587.11, of which $40,562.80 was the portion credited to Munsuri, and $8,024.31 was the portion credited to Trueba. On this same date, April 30, 1902, the ledger shows undistributed profits of $25,025.62 carried forward from the previous ledger. These profits were fictitious for the interest and discount account showed a loss of $1,892.39 and the general expense account showed a loss of $2,124.92, both of which accounts should have been closed out into the profit and loss account, and because the testimony showed that at the time of the distribution of these profits, the firm could not meet its debts and had been unable to collect its outstanding accounts. These fictitious profits were distributed as dividends on June 27, 1902, $15,185.90 to Munsuri and $6,822.66 to Trueba, the rest being distributed by way of gift to two clerks in the employ of the firm Messrs. García and Urrejola.

III.

At the time of the distribution of these profits, June 27, 1902, Munsuri stood in debt to the firm for monies and goods withdrawn to the extent of $22,752.79, and Trueba's indebtedness to the firm

was $10,369.01. The share of each in these fictitious profits was applied in cancelling the indebtedness of each partner and the capital account of both Munsuri and Trueba was reduced sufficiently to cancel the balance of the indebtedness of each partner to the firm. Thus by a distribution of fictitious profits and a withdrawal of capital by each partner, his individual debt to the firm was wiped out with the result that the firm's capital was reduced from $48,587.11 to $37,473.87, and debts due the firm to the full extent of $25,025.62 from financially responsible persons were wiped out.

40 IV.

On the 17th of June, 1902, due to the difficulty of collecting their accounts and to their lack of funds as recited in the testimony and in the deed of loan, Munsuri loaned to the firm $40,000.00 payable on demand, which $40,000.00 was credited to Munsuri in a separate account called, "Munsuri's Loan Account." This was done nine days previous to the distribution of the fictitious profits shown above and at a time when Munsuri's debt to the firm on his personal account was $22,752.79. This loan being made at such a time shows that Munsuri was putting money into the firm in the guise of a loan so that in case of failure he could come in as a creditor and compete with the other creditors.

On March 7, 1903, twenty-three days before the firm went into suspension of payments, the three retail stores in San Juan owned by the firm, La Primavera, La Capital de Vizcaya and La Puertorriqueña, were transferred to Munsuri at a total valuation of $23,180.14, which amount was applied on Munsuri's loan account, leaving him as a creditor of the firm for the balance of the $40,000.00 loan, $16,819.86 for which he appeared as a creditor of the firm in the inventory filed in the San Juan District Court April 1, 1903, in the suspension of payment proceedings. In the sale of these stores to Munsuri, the valuation of La Puertorriqueña was placed at $8,574.98, whereas the valuation of this store on the firm's books was $8,681.65, being $106.67 more than the price at which it was sold to Munsuri. La Capital de Vizcaya was sold to Munsuri at a valuation of $7,861.35, while the inventory valuation of the store was $7,981.79, being $120.44 more than the price at which it was sold to Munsuri. La Primavera was sold to Munsuri at a valuation of $6,743.81, whilst the inventory valuation by the firm of
41 said store was $6,993.85, being $250.04 more than the price at which the store was sold to Munsuri. These last two stores had made a profit on the previous ten and one-half months' business.

V.

On April 1, 1903, Sucesores de José Hernaiz filed a petition in suspension of payments in the San Juan District Court, to which they attached as required by law, an inventory of their assets and liabilities and a proposition of settlement to the creditors of fifty per cent. and the other fifty per cent. in four years in annual instalments without interest and without security. Notices of this proceeding

and of the proposition for payment of the creditors were sent to all the creditors. June 4th was appointed as the date for the meeting of creditors but no meeting was held because bankruptcy proceedings were commenced in the Federal Court, thus superseding the proceedings in suspension of payments under the local law.

VI.

On June 8, 1903, an involuntary petition in bankruptcy was filed in the United States District Court for Porto Rico by several of the creditors; on June 15, 1903, a motion was filed on behalf of the bankrupt to dismiss the petition and quash the service of the summons, but nothing was done during the summer months while the Judge was absent on his vacation, and on October 31st the motion to quash was overruled and the firm required to answer the petition; on November 11th, Munsuri filed an answer denying his liability as a general partner and Trueba filed an answer denying the acts of bankruptcy complained of in the petition and denying insolvency; on November 23rd, the cause was set down for hearing for December 2nd on the issues thus raised, but on December 2nd, the day for the hearing, the petitioning creditors moved to dismiss the petition, and on December 3rd, an order was entered requiring the bankrupts to file a list of their creditors in order that notices of the motion
42 to dismiss might be sent them. During the pendency of these proceedings, since June 8, 1903, Munsuri had negotiated with the creditors and had procured an assignment from them of their credits, and on December 7, 1903, Munsuri filed in the bankruptcy proceedings his consent to the dismissal of the said petition as a creditor in his own right to the extent of $16,819.86 and as owner by assignment of the credits of nearly all the rest of the creditors. Notices of the motion to dismiss the petition were sent to all of the creditors, and, there being no further opposition to the dismissal, the petition was dismissed March 28, 1904. There was never any adjudication in bankruptcy nor any reference nor was the bankrupt himself ever examined or his books submitted nor were proofs of debt ever filed. The proceedings were dismissed before they ever reached that stage, and there was no consideration on the merits of the claims of the creditors. The receipts show that on June 25, 1903, A. & S. Henry & Co. and Schill, Seebohm & Co. assigned their claims to Munsi, no consideration being stated. On July 1, 1903, the American Trading Company assigned its claim to Munsuri; and on November 3, 1903, all of the New York creditors except Bernheimer & Walter and Grinnell, Willis & Co. gave receipts in full running in the name of Sucesores de José Hernaiz; Bernheimer & Walter later assigning their claims, December 2, 1903, to Munsuri, and Grinnell, Willis & Co. following with an assignment to Munsuri on February 26, 1904.

VII.

During the negotiations conducted by Munsuri for the purchase of claims of creditors, he represented himself always as a special partner in the bankrupt firm and denied committing any act which

would make him liable by law as a general partner and asserted that he had lost as a creditor by reason of the failure of the firm
43 more heavily than any other creditor. He used as a basis for the purchase of these claims the inventory of the liabilities and assets of the firm filed by it in the San Juan District Court in the suspension of payments proceedings. According to this inventory, the assets were $117,481.94 and the liabilities $87,576.15. None of Munsuri's individual property was included in the assets of the firm, and as the effect of the distribution of the fictitious profits of $25,025.62 was to cancel an indebtedness to the firm of the same amount, $25,025.62 of debts due the firm did not appear in the assets; also as the effect of the reduction of the capital accounts of Munsuri and Trueba by $11,113.24 was to cancel debts due the firm, this $11,113.24 indebtedness due the firm did not appear in the assets; nor did the $23,180.14, the amount at which the three stores were transferred to Munsuri twenty-three days before the suspension of payments proceedings were commenced, appear in the assets, although this transfer to Munsuri was a preference given to a partner on a fictitious debt pretended to be owed by the firm to the partner Munsuri. Thus the assets of the firm as shown in the inventory were short by $59,309.00 of what they should have appeared.

This inventory further shows Munsuri as a creditor in the sum of $16,819.86, and, as he was a general partner in the firm, he could not have competed with the creditors as a creditor. Thus the liabilities should have been less by $16,819.86, or $70,756.29 instead of the $87,576.15 stated in the inventory.

VIII.

After June 27, 1902, when the distribution of profits was made, Munsuri continued to withdraw money and merchandise from the firm so that on June 24, 1903, the day he purchased the claims of the English creditors the balance owed by him to the firm, according to his personal account as shown in the ledger, was $7,183.32, and by November 1, 1903, two days prior to his purchase of the
44 claims of a majority of the New York creditors, he had increased his indebtedness to the firm to $15,373.39. During all of this time he was negotiating with the creditors for the purchase of their claims and concealing these facts from them. By April 13, 1904, he owed the firm $34,973.49, and to cancel this indebtedness all of the claims which he had pretended to purchase as a third party from the creditors, were turned in by him to the firm and credited to him, in some cases for the actual amount paid by him, or twenty-five per cent., in others for seventy-five per cent. and in still others for amounts having no relation to the amount paid by him therefor. It is perfectly evident that this was a fictitious transaction and was done to cancel the total indebtedness of Munsuri to the firm as appeared in his personal account.

IX.

The amount of $16,891.86, for which Munsuri appears in the inventory filed in the suspension of payments proceedings April 1,

1903, as a creditor, was later reduced by cash payments made by the firm to Munsuri amounting to $5,650.75, leaving a balance in favor of Munsuri on his so-called loan account of $11,719.11, for which he has filed his duly sworn-to proof of debt in these present bankruptcy proceedings.

X.

Of the $40,562.80, with which Munsuri is credited on April 30, 1902, as his share of the capital in the firm, and the $40,000.00 turned over to the firm June 17, 1902, under the guise of a loan, a total of $80,562.80, Munsuri has got back $15,185.90, his share of the fictitious profits declared on June 27, 1902, $7,566.89 capital withdrawn on the same date, $23,180.14 the value of the stores transferred to him on March 7, 1903, and $5,650.95 cash and credits paid to him on account of the loan, and $24,973.49, with-
45 drawn in cash and merchandise and charged to his personal account, a total of $86,557.17, from which must be deducted the $17,687.73 which he paid to the creditors in the purchase of their claims, a net total of $68,869.44, leaving a balance out of all the monies put in the firm by him in whatever guise of $11,693.36, which lacks $25.75 of being the amount for which Munsuri is now claiming as a creditor in these present proceedings, $11,719.11.

XI.

Immediately after the loan of $40,000.00 to the firm by Munsuri, on June 17, 1902, and the declaration of fictitious dividends on June 27, 1902, the firm stocked up very heavily in merchandise bought from the creditors, most of whom appear as creditors for this same merchandise in the inventory of April 1, 1903, and have filed their proofs of debt in these present bankruptcy proceedings; so that the merchandise account of the firm jumped up from $14,092.18, the inventory of merchandise on hand April 30, 1902, to $98,413.38 on February 15, 1903, the date of the next inventory, an increase of $84,321.10. These purchases were made at a time when the firm was in no better condition than it had been in June, 1902, when the testimony shows the firm could not collect its outstanding accounts and had not sufficient funds to pay creditors and had to borrow $40,000.00. Furthermore, the sales of this merchandise during this same period amounted to $75,787.81, on which a gross profit during this period was realized of only $195.81, out of which would have to be taken expenses for the same period.

46 *Conclusions of Law.*

I.

There was fraud in the negotiations by Munsuri for the purchase of the claims of creditors; by the distribution of the $25,015.72 in fictitious profits June 27, 1902, and withdrawal of the capital of each partner already placed at the risk of the business, an act particularly fraudulent on the part of the special partner whose liability for the firm debts is limited to the capital contributed, (Sentencia, Supreme

Court of Spain, October 7, 1881), in order to cancel debts due the firm, and by the fraudulent transfer by way of preference to Munsuri, a general partner of the firm, of the three retail stores at a value of $23,180.14 on March 7, 1903, just after the inventory of February 15, 1903, and twenty days prior to the suspension of payments, $59,309.00 of the assets of the firm were fraudulently concealed from their creditors; and the firm was guilty in addition of a positive misrepresentation to their creditors in filing in the District Court of San Juan on April 1, 1903, an inventory, and sending notice thereof to all the creditors, by which inventory their assets appeared as $117,481.94, whereas they should have appeared as $176,790.94; and there was a further misrepresentation in using said inventory as a basis of settlement of the claims of creditors. This inventory was further fraudulent and a misrepresentation in that Munsuri was put down as a creditor for $16,819.86, increasing the liabilities thereby to $87,576.15 when they should have appeared as only $70,756.29, although it has been held by this court that he was a general partner in the firm, and so he could not have competed as a creditor even had his claim been a valid and *bona fide* claim.

Not only was this claim by Munsuri as a creditor against the firm for $16,819.96 fraudulent because he was a general partner, but it was not a *bona fide* claim in itself, for it was for the balance
47 after receiving the transfer of the stores at $23,180.14 due on the $40,000.00 loan made June 17, 1902, to the firm by Munsuri, on which date he stood indebted to the firm for $22,752.79, and should have paid back to the firm what he owed, making the loan thereby less by more than half, and that which might be called a real loan would then have been more than cancelled by the transfer of the three retail stores at a value of $23,180.14, even assuming Munsuri to have been only a special partner and so permitted to compete with creditors for *bona fide* credits. This pretended loan of $40,000.00 was fraudulently made in that it permitted Munsuri to claim for monies he really owed the firm and the balance in money which he would have had to contribute anyway as a general partner for the payment of the liabilities of the firm.

Even should we regard Munsuri as a special partner only, and not responsible for the misrepresentation and concealment made by the firm in their inventory, still he knew about it for he was a party to the transaction and he took advantage of such misrepresentation in his negotiations with the creditors for the purchase of their claims, and he was guilty of a fraudulent concealment himself in not disclosing to the creditors the fact of his withdrawal of merchandise and cash from the firm, a fact peculiarly within his own knowledge, amounting to $7,183.32, the day before he purchased the claims of the English creditors, and to $15,373.39 just prior to his settlement with a majority of the New York creditors.

But the Court has held Munsuri to have been a general partner in the firm. (See Opinion, October 25, 1907), and under the decision, his individual property should have been included in the assets of the firm.

In re Allen's Estate, 41 Minn. 430 (43 N. W. Rep. 382).
Arts. 49, 127 and 872 Code of Commerce.

And the inventory as filed and used as the basis of settlement, by not including such individual property, was a further mis-
48 representation and concealment by the firm of assets in fraud of creditors, and Munsuri in effect made the same representation by claiming to be a special partner.

That these fraudulent transactions and misrepresentations were all part and parcel of one continued purpose and scheme to defraud the creditors for the benefit of Munsuri, is shown by the further facts that all the books of account, except the last ledger and journal, were destroyed by the firm; that the retail stores were transferred to Munsuri at less than their actual value, according to the books of the firm, but how much further loss cannot be shown without the books which have been destroyed; that, although the assets of the firm were set forth in the inventory as $29,905.79 more than the liabilities, still, at the same time the firm threw the creditors into alarm by making a proposition of settlement on a basis of only fifty per cent. down and the rest in four annual instalments without interest and without security, thus forcing the creditors to such terms as the firm might make; that Munsuri, after settling with the creditors, withdrew cash and merchandise from the firm so that he was indebted to the firm on his personal account by April 13, 1904, in the sum of $34,973.49, to cancel which he turned in the credits bought by him to the firm, charging the firm in some instances what he had paid for them and in other instances seventy-five per cent. of their face value, though he had bought them in at twenty-five per cent.; that he was paid $5,650.75 further on account of the pretended loan; that by these last two payments to him and the previous transactions as set forth already, which amount to misrepresentation and concealment of assets, Munsuri got back $68,869.44 of the total put in by him, leaving a balance of $11,693.36, which is $25.75 less than what he is still claiming as a creditor by his proof of debt for $11,719.11 filed in these present proceedings; and by the fact that the firm stocked up very heavily between June 27, 1902,
49 and February 15, 1903, in merchandise in anticipation of failure, and that it is largely for payment of the goods bought during that time that these creditors are now claiming in bankruptcy.

II.

In the transaction whereby Munsuri pretended to purchase the claims of creditors as a third person, he must be considered in law as having acted for the firm, of which he has been held by this court to be a general partner. (Opinion of Rodey, J., October 25, 1907.)

"One partner cannot buy up for his own benefit a claim against his firm, but if he takes an assignment of such a claim, he will be considered as holding it for the firm."

22 Am. & Eng. Ency. 116.

III.

The pretended purchase and sale were therefore an attempt by the debtor to compound his debts.

"A composition by a third party often takes the form of a purchase and sale of the claims of the creditors; and it is sometimes difficult to decide whether such a transaction is a true composition or merely a sale of the claims to the third party without the incidents of a composition. It would seem to be well settled however that the criterion by which to decide is: Was the third party really acting on behalf of the debtor? If so, the transaction is a composition."

8 Cyc. 485.

IV.

False representations by the debtor as to the amount of his assets or concealments are ground for setting aside a composition.

"The theory of a composition is that the cash value of the bankrupt's estate is substantially divided among his creditors in proportion to their respective debts."

Loveland on Bankruptcy, p. 548, 1st Edition.

50 "The policy of the law demands the utmost good faith on the part of the debtor in effecting a composition; and any fraud, misrepresentation, concealment or suppression practiced by him with respect to any material fact will vitiate the composition and entitle a creditor injured thereby to treat it at his option as null and void at any time within the statute of limitations. The mere receipt of part, or even all of the benefit of the composition will not validate the transaction."

8 Cyc. 463.

"As the consideration of a composition is the surrender by the creditors of some portion of what is justly due them, the strictest good faith is required. Any departure from good faith in the slightest degree avoids the transaction as to innocent parties, who may thereupon ignore the composition and sue on their original claims. And an innocent creditor, thus suing on the original debt, need not rescind the composition or return any sums which may have been received under it; but such sums will be considered merely as payments *pro tanto* on the original debt."

6 Am. & Eng. Ency. 392 and notes.

"A fraudulent conveyance prior to the composition invalidates the composition."

6 Am. & Eng. Ency. 394.

"If a debtor having a dormant partner, puts him on the list of creditors, the composition is thereby rendered void."

Carter *v.* Connell, 1 Whart. (Pa.) 392.
See also 8 Cyc. 464.
6 Am. & Eng. Ency. 393 and note.
Armstrong *v.* Bank, Fed. Cases No. 545.

The Bankruptcy Act of 1898 specifically provides in its various provisions against fraudulent preferences and concealments, and most of the decisions involving the kind of fraud shown here are

under the Bankruptcy Act, and therefore strictly not in point as the acts were forbidden by statute. If it were not for this fact, there would be more decisions as to fraud in a common law composition.

51 V.

The transaction between Munsuri and the creditors cannot in any way be considered a composition under the bankruptcy act for there was no examination of the debtor nor confirmation by the court, as is required for a composition under the bankruptcy act.

See Bankruptcy Act, Sec. 12.

VI.

In view of these findings of fraud, it is unnecessary to pass upon the question whether there was an accord and satisfaction or a compromise and settlement, for in any case fraud is ground for setting aside.

1 Am. & Eng. Ency. 428.
1 Cyc. 338.
8 Cyc. 528.
Elfelt *v.* Snow, Fed. Case No. 4342.

VII.

The dismissal of the petition in bankruptcy No. 11 by consent does not bar the creditors from subsequently putting in their claims in these subsequent bankruptcy proceedings.

6 Ency. Pl. & Pr. 986-7.
45 Fed. Rep. 588.

VIII.

The remedy of the creditors is to sue for the balance of their claims, treating the payment already made as merely a payment on account.

1 Cyc. 338.
Elfelt *v.* Snow, Fed. Case No. 4342.

52 *Conclusion.*

Inasmuch as there was fraud in the negotiations with creditors for the purchase of their claims by way of misrepresentation of assets and concealment of assets, material facts that would have influenced the creditors in their acceptance of the offer made by Munsuri, the receipts taken from the creditors were fraudulently obtained and cannot constitute a bar to their present claims for the balance of their debts, and therefore the motion to disallow the claims is overruled.

Oct. 15, 1908.

ANDRÉS B. CRÓSAS,
Referee in Bankruptcy.

53 *Petition for Review of Referee's Order.*

(Filed October 20, 1908.)

In re SUCESORES DE JOSÉ HERNAIZ.

In Bankruptcy.

Petition for Review.

Now at this time comes Julian Munsuri, by his Solicitor, Willis Sweet, and petitioning for the review of an order of the Referee in the above entitled matter, respectfully submits:

I.

That on the 27th day of September, 1906, the mercantile firm of Successores of José Hernaiz & Co. was duly adjudged bankrupt; and in an opinion handed down by said Honorable Court on the 14th day of July, 1908, petitioner was held to be a general partner in said firm.

II.

That on the question of the former settlement and adjudication of the claims, or alleged claims, pending against said bankrupt firm, except the claim of Heller & Long, the Court in said opinion expressed a preference for having said question first passed upon by the Referee; and in accordance with said suggestion, Julian Munsuri, by his attorney, Willis Sweet, appearing specially for that purpose, on the — day of July, 1908, filed a petition with A. Crosas, Referee, praying that the orders theretofore made allowing said claims should be reconsidered, vacated and set aside, and said claims disallowed.

54 III.

Proceedings were had on said petition, briefs were filed by the respective parties in support of their contentions, and on the 15th day of October, 1908, the Honorable Referee handed down his opinion overruling said motion to disallow said claims.

The main ground for the decision as stated is that there was fraud in the negotiations with the creditors for the purchase of said claims. But there was no fraud, as your petitioner respectfully submits, of whatever character or kind, in negotiating said settlement, but that the whole transaction was fair and entered into by the creditors with a full knowledge of all of the conditions and circumstances of the case; that no misrepresentation or attempt to deceive the creditors were made, and that there is no charge of fraud in the record, and no evidence whatever of fraud in connection with the transaction.

Wherefore, your petitioner alleges and contends that the Referee erred:

(1.) In finding that there was any fraud in the negotiations or in any part of the transcations had; or that any issue of fraud had been raised.

(2.) In not upholding said transactions and declaring them a bar to the present claims of the alleged creditors concerned;

(3.) In overruling the motion to disallow said claims.

(4.) In holding that the decision of the District Court was not an adjudication.

(5.) In disregarding the question of laches raised by petitioner at said hearing.

And your petitioner therefore prays that you forthwith certify to the Judge the questions involved, together with the evidence relating thereto, and the findings and order made in the premises, to
55 the end that said order of October 15th, 1908, may be reviewed by the Judge of said Court, and, error being found, that it may be vacated and set aside, and proper orders made in accordance with the petition heretofore filed.

WILLIS SWEET,
Attorney for Julian Munsuri, Appearing Specially for the Purposes Herein Set Forth.

Accepted service of the foregoing petition by receiving a copy of the same this 21st day of Oct. 1908.

WM. H. HAWKINS.

In Bankruptcy. No. 22.

In the Matter of SUCESORES DE JOSÉ HERNAIZ, in Liq., Bankrupt.

Certificate of Referee to Judge.

I, Andrés B. Crósas, one of the Referees of said court in bankruptcy, do hereby certify that in the course of the proceedings in the said cause before me a motion was filed on behalf of Julian Munsuri for the reconsideration and disallowance of all the claims filed before me except that of Heller & Long, all of which creditor's claims had been allowed. Hearings were had, evidence submitted and testimony taken for and against said motion, and counsel on both sides submitted briefs. I made a finding of fact and of law and denied the said motion. A petition has been presented asking for a review by the court of the said question on behalf of Julian Munsuri,
56 and the question raised by the said motion is hereby certified to the Judge for his opinion thereon.

I return as the record and transmit herewith the following items:

1. The creditor's proofs of claim in question filed and allowed.
2. The motion filed by Julian Munsuri for the reconsideration and disallowance of the said claims.
3. The testimony and exhibits filed in the hearing of said motion.
4. All the testimony and exhibits in the case.
5. The report of the Referee making a finding of fact and of law and denying the said motion.

6. The petition for review by the Judge of said finding and report of the Referee.

ANDRÉS B. CRÓSAS, *Referee.*

(Filed October 22, 1908.)

57 In the District Court of the United States for Porto Rico.

Bankruptcy. No. 22.

In the Matter of SUCESORES DE JOSÉ HERNAIZ, Bankrupts.

Findings of Fact and Conclusions of Law by the Court.

(Filed February 9, 1909.)

In connection with the opinion rendered in the above entitled cause on January 29, 1909, in which the Court gives its reasons why the report of the Referee of October 15, 1908 on the question of the reconsideration and disallowance of the claims of various creditors will be overruled and an order to that effect entered, and in pursuance of General Order in Bankruptcy No. 36, P. 3, providing that a statement of the Findings of Fact and Conclusions of Law be made and filed by the Court, the Court does not quarrel with the Findings of Fact made by the Referee and adopts the same, but reverses and sets aside the Referee's conclusions of law and concludes as a matter of law:

First. That there was not sufficient evidence to warrant the finding of fraud by Munsuri in obtaining the said receipts from the creditors.

Second. That as there was no fraud in obtaining the receipts, said receipts show a settlement that is binding on the creditors and cannot now be set aside.

Third. That as said receipts show a binding settlement, the creditors cannot now put in a claim for the balance, and their claims must, therefore, be disallowed.

Fourth. That the creditors now trying to set aside the settlement and compromise are only a minority of all the creditors and have been guilty of inexcusable laches as shown in our opinion in the files.

B. S. RODEY, *Judge.*

58 *In re* SUCESORES DE JOSÉ HERNAIZ, Bankrupts.

(Not to be Printed.)

Memorandum by the Court placed in the files, giving its reasons for overruling the Referee's approval of certain claims.

This matter is before us on an appeal from the action of the Referee in approving and allowing certain accounts of creditors. The bankrupt Munsuri objects to the approval of certain of these accounts and introduces receipts and assignments of the same.

59 It appears that nearly three years ago (see Bankruptcy suit No. 11) several of these creditors filed a petition in involuntary bankruptcy against Sucesores de José Hernaiz, and after considerable pleading was done but without any adjudication or otherwise, notice was sent to all the creditors, and the cause was dismissed by the parties who instituted it.

We have given more than a month's time off and on to an examination of the briefs and authorities and to looking over the evidence, and it is seldom that such a painstaking effort has been made by counsel. Some time since on the motion of a creditor who did not agree to the former bankruptcy proceedings, we held the partner Julian Munsuri to be a general instead of a special partner (see our opinion in the files). Now the creditors who settled with him in the former bankruptcy proceedings and dismissed the proceedings are coming in notwithstanding their settlement and wanting to collect the balance of their claims. Both the referee and their counsel have made a most painstaking search of the books of the concern, and on the theory that because the Court has held that Munsuri was a general instead of a limited partner and because they say fraud was committed in obtaining the settlement, the action of the Referee should be sustained.

We cannot agree to this. None of the former creditors were diligent and no one but one or two firms were diligent. At this late day it is not easy to tell what the considerations for making that settlement and dismissing the former bankruptcy proceeding were. All the creditors were represented by counsel. Those counsel could just as well have known at that time that Munsuri was guilty of acts that would make him a general instead of a limited partner, yet they did nothing in that regard. There is no evidence of any sufficient fraud in the bringing about of that settlement. Munsuri
60 has not had his day in court on it, neither have these creditors testified in the cause. All the evidence of fraud is made up by the Referee and counsel for the creditors. It is no light matter to go now and take this man Munsuri's private property for the benefit of a lot of creditors who settled with him with their eyes open nearly three years ago, and when every fact that has since been brought out, was staring them in the face at that time.

Counsel for the creditors as well as the Referee simply make a labored effort with a lot of book-keeping to show fraud. In our opinion above referred to in the files, it will be seen that when we rendered the same we gave no intimation that we would feel ourselves bound to permit these creditors, who settled in the way stated, to come in and prove their claims, but specifically stated that we expressed no opinion as to that. We have looked over the settlement made and examined this question from end to end and our conscience will not permit us on the whole case to permit these creditors to come in now without any real showing by themselves of being misled, deceived or defrauded other than is made by the Referee and their attorneys from the books of the bankrupt concern. No man has to defend until he is properly attacked, and all these entries in the books might be explained were Munsuri here to do so.

The diligent only are favored in law. The approval of these accounts for which receipts and assignments were held by Munsuri and introduced, and on which these few particular creditors got the money three years ago at a time when Munsuri believed himself to be a limited partner and did not know that the law made him liable as a general partner, would in our opinion be wrong and would give them an undue advantage.

Therefore the approval by the Referee of all those previously settled claims is reversed and set aside, and only the accounts
61 of creditors who did not so settle their claims, will be permitted to be allowed, and an order to that effect will be entered.

(Placed in the files under date of Jan. 29, 1909.)

In Bankruptcy. No. 22.

In the Matter of SUCESORES DE JOSÉ HERNAIZ, Bankrupts.

Order.

(Filed Feb. 9, 1909.)

Now in accordance with the opinion rendered in the above entitled cause on the 29th of January 1909 in which the Court gave its reasons why the report of the Referee of Oct. 15, 1908, would be overruled and the claims thereby allowed would be disallowed, and the Court having made and filed its findings of fact and conclusions of law in pursuance of the provisions of General Order in Bankruptcy No. 36 paragraph 3, it is

Ordered that the claims of Tefft, Weller & Co., A. & S. Henry & Co., S. E. Heymann & Co., Sherman, Reid & Co. (Sherman & Sons Co.), Bernheimer & Walter, Garner & Co., Sweetser, Pembrook & Co., Everett, Heaney & Co., Grinnell, Willis & Co., Schill, Seebohm & Co., and American Trading Company be and they are hereby disallowed.

B. S. RODEY, *Judge.*

62 In Bankruptcy. No. 22.

In the Matter of SUCESORES DE JOSÉ HERNAIZ, Bankrupts.

Petition for Appeal.

And now come the creditors Tefft Weller & Co., A. & S. Henry & Co., S. E. Heymann & Co., Sherman & Sons Co., Bernheimer & Walter, Garner & Co., Sweetser, Pembrook & Co., Everett, Heaney & Co., Grinnell, Willis & Co., Schill, Seebohm & Co. and American Trading Co. and considering themselves aggrieved by the judgment and order made on the 9th of February 1909 whereby the referee's report denying the motion to disallow the claims of said creditors is reversed and set aside and the said claims are disallowed, and they

do hereby appeal from said judgment or order to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, and they pray that this appeal may be allowed, that the amount of the bond necessary to be given in order that the appeal may operate as supersedeas be fixed and that the transcript of the record, proceedings and papers upon which said judgment and order was made, duly authenticated may be sent to the Supreme Court.

WM. H. HAWKINS,
Attorney for said Creditors.

63 In Bankruptcy. No. 22.

In the Matter of SUCESORES DE JOSÉ HERNAIZ, Bankrupts.

Assignment of Errors.

(Filed Feb. 15, 1909.)

And now comes Tefft Weller & Co., A. & S. Henry & Co., S. E. Heymann & Co., Sherman & Sons Co., Bernheimer & Walter Garner & Co., Sweetser, Pembrook & Co., Everett, Heaney & Co., Grinnell, Willis & Co., Schill, Seebohm & Co., and American Trading Co. creditors of the above named bankrupt firm, by William H. Hawkins their attorney, and assign the following as the errors committed by the Court during the progress of said cause:

First. The Court erred in holding as a conclusion of law that there was not sufficient evidence of fraud in the obtaining of said receipts and assignments from the creditors.

Second. The Court erred in holding as a conclusion of law that the receipts and assignments showed a settlement with the said creditors of their claims that is binding on them.

Third. The Court erred in holding as a conclusion of law that said receipts are bar to the creditors now putting in their claims for the balance.

Fourth. The Court erred in holding as a conclusion of law that said creditors have been guilty of inexcusable laches.

WM. H. HAWKINS,
Attorney for said Creditors.

64 In Bankruptcy. No. 22.

In the Matter of SUCESORES DE JOSÉ HERNAIZ, Bankrupts.

Order Allowing Appeal.

(Filed February 15, 1909.)

The creditors herein, Tefft Weller & Co., A. & S. Henry & Co., S. E. Heymann & Co., Sherman & Sons Co., Bernheimer & Walter, Garner & Co., Sweetser, Pembrook & Co., Everett, Heaney & Co., Grinnell, Willis & Co., Schill, Seebohm & Co., and American Trading Co. having heretofore filed herein their petition for an appeal from the judgment and order reversing and setting aside the report of the

Referee of October 15th, 1908, and disallowing the claims of the said creditors, and they having filed assignments of errors, and it appearing to the Court that some of the said claims are each in excess of the sum of $5,000 it is hereby,

Ordered, that said appeal be allowed the same to act as supersedeas upon the filing of a bond conditioned as required by law in such cases, in the sum of $5,000 and that a transcript of the record, proceedings, and papers upon which said judgment was made be sent to the Honorable the Supreme Court of the United States.

B. S. RODEY, *Judge.*

65 In the District Court of the United States for Porto Rico.

Bankruptcy. No. 22.

In the Matter of SUCESORES DE JOSÉ HERNAIZ, Bankrupt.

Bond on Appeal.

Know all men by these presents, that we, William H. Hawkins, as attorney for Tefft, Weller & Co., A. & S. Henry & Co., S. E. Heyman & Co., Sherman & Sons Co., Bernheimer & Walter, Garner & Co., Sweetser, Pembrook & Co., Everett, Heaney & Co., Grinnell, Willis & Co., Schill, Seebohm & Co., and the American Trading Co., creditors in the above named cause, as principals, and the American Surety Company of New York, as surety, are held and firmly bound unto John L. Gay, Clerk of the said Court, in the full and just sum of five thousand dollars ($5000) to be paid to the said John L. Gay or his successors in office for the benefit of whom it may concern; to which payment well and truly to be made, we bind ourselves, and our successors, jointly and severally by these presents.

Sealed with our seals and dated this 23rd day of February in the year of our Lord one thousand nine hundred and nine.

Whereas lately at a session of the District Court of the United States for Porto Rico, sitting in bankruptcy, in the matter of Sucesores de José Hernaiz a judgment was rendered against the said creditors, and the said creditors having obtained an appeal and filed a copy thereof in the Clerk's office of the said court to reverse that judgment in the aforesaid matter,

Now therefore the condition of the above obligation is such that if the said creditors shall prosecute their said appeal to effect, and shall answer all the damages and costs that may be awarded against them, if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

66 WILLIAM H. HAWKINS. [SEAL.]
THE AMERICAN SURETY CO. OF NEW YORK,

[Seal of American Surety Co. of N. Y.]

By H. L. COCHRAN,
Resident Vice-President.
R. H. TODD,
Resident Ass't Secretary.

UNITED STATES OF AMERICA,
Island of Porto Rico, ss:

H. L. Cochrane and Robert H. Todd, being severally duly sworn says each for himself that he is the duly appointed resident vice president, and resident assistant secretary, respectively in Porto Rico of the American Surety Company, a corporation organized under and existing by virtue of the laws of the State of New York, with its home office in the City of New York, and having duly qualified under the laws of Porto Rico to do business in Porto Rico, and that they are duly empowered and authorized to execute the foregoing bond on behalf of said corporation; that said corporation is worth largely in excess of the sum of five thousand ($5000) dollars over and above all debts and liabilities.

H. L. COCHRAN.
R. H. TODD.

Subscribed and sworn to before me this 23rd day of February, 1909.

[Seal of Notary Public, Gabriel Guerra.]

GABRIEL GUERRA.

The above bond is approved by me this 24th day of February, 1909.

B. S. RODEY, *Judge.*

67 Bankruptcy. No. 22.

In the Matter of SUCESORES DE JOSÉ HERNAIZ, Bankrupt.

Præcipe for Transcript.

(Filed February 25, 1909.)

To the Clerk:

Please make transcript of the following named papers in the above entitled matter:

1. Petition in voluntary bankruptcy without schedules.
2. Orders of adjudication and of reference.
3. Referee's certified list of creditors filing proofs of debt, filed with Clerk Oct. 12, 1907.
4. Motion by creditors that Munsuri be declared a general partner and ordered to turn over his property to the trustee.
5. Opinion of District Judge, Hon. B. S. Rodey, filed Oct. 25, 1907.
6. Judgment declaring Munsuri a general partner.
7. Order that Munsuri turn over his property to Trustee.
8. Petition of Munsuri with exhibits attached filed with Referee asking disallowance of claims of creditors.

9. Report and finding of Andrés B. Crósas, Esq., Referee, filed Oct. 15, 1908.
10. Petition by Munsuri to review Referee's findings.
11. Referee's Certificate to the Court.
12. Findings of Fact and conclusions of law by the Court, with opinion of District Judge, Hon. B. S. Rodey, filed Jan. 29, 1909, attached.
13. Judgment of disallowance of claims entered Feb. 9, 1909.
14. Petition on appeal.
15. Assignment of errors.
16. Allowance of appeal.
17. Citation and acknowledgment of service of same.
18. Bond on appeal.

68 19. Præcipe for Transcript.
20. Certificate.

and file said transcript with the Clerk of the Supreme Court of the United States.

WM. H. HAWKINS,
Attorney for Creditors.

Dated February 25, 1909.

69 In the District Court of the United States for Porto Rico.

Voluntary Bankruptcy. No. 22.

In the Matter of Sucs. de José Hernaiz, in Liquidation, Bankrupts.

I, John L. Gay, Clerk of the District Court of the United States for Porto Rico, do hereby certify the foregoing 68 — numbered from "1" to "68" inclusive, to be a true and correct copy of the record and proceedings in the above-entitled cause as the same remains of record and on file in the office of the clerk of said court, as called for by the præcipe for transcript filed by counsel for the appellant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, this 24th day of March, A. D. 1909.

[Seal United States District Court for the District of Porto Rico.]

JOHN L. GAY,
Clerk District Court of the United States for Porto Rico.

70 The United States of America, *ss:*

To Sucesores de Jose Hernaiz, and Julian Munsuri, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the City of Washington, within sixty days from the date of this writ, pursuant to an appeal, duly allowed by the District Court of the United States for Porto Rico,

sitting as a Court of Bankruptcy, and an assignment of error, filed in the Clerk's office of said court on the 15th day of February A. D. 1909, in the matter of Sucesores de Jose Hernaiz, bankrupt, to show cause, if any, why the judgment rendered in said cause reversing the finding and order of the referee in bankruptcy allowing the claims of Tefft, Weller & Co., A. & S. Henry & Co., Sweetser, Pembrook & Co., S. E. Heymann & Co., Sherman & Sons Co., Bernheimer & Walter, Garner & Co., Everett, Heaney & Co., Grinnell, Willis & Co., Schill, Seebohm & Co., and The American Trading Co., and disallowing the said claims, as in said petition of appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable B. S. Rodey, Judge of the District Court of the United States for Porto Rico this 23rd day of February, in the year of our Lord one thousand nine hundred and nine, and of the Independence of the United States the one hundred and thirty-third.

B. S. RODEY,
Judge of the District Court of the United States for Porto Rico.

Service of the within writ by receipt of a copy thereof is acknowledged this 23rd day of February, 1909.

HENRY F. HORD,
Attorney for Bankrupt.
WILLIS SWEET,
Attorney for Julian Munsuri.

71 [Endorsed:] Bankruptcy. No. 22. In the District Court of the United States for Porto Rico. In the Matter of Sucs. de José Hernaiz, Bankrupt. Citation on Appeal. Filed — Clerk's Office, United States District Court, February 23, 1909. John L. Gay, Clerk of the Court, by C. A. Davidson, Deputy.

72 In the Supreme Court of the United States, October Term, 1908.

No. 767.

TEFFT, WELLER — CO. ET AL., Appellants,
vs.
JULIAN MUNSURI, Appellee.

Stipulation.

Whereas by inadvertence and mistake the transcript filed herein on March 23, 1909, is not the transcript of record on appeal of the appellants, but a transcript of record prepared for the appellee, and appellants through such inadvertence docketed the same and entered their appearance herein, now to correct said error it is stipu-

lated by the parties through their counsel that the transcript of record called for by the præcipe for transcript of record signed by Wm. H. Hawkins and received by the Clerk of this Court April 7, 1909, be substituted in the place and stead of the transcript of record on file herein.

Washington, D. C., April 10, 1909.

WM. H. HAWKINS,
Counsel for Appellants.
WILLIS SWEET,
Counsel for Appellee.

73 [Endorsed:] File No. 21,563. Supreme Court U. S. October Term, 1908. Term No. 767. Tefft, Weller & Co. *et al.*, appts., *vs.* Julian Munsuri. Stipulation as to transcript of record. Filed April 12th, 1909.

Endorsed on cover: File No. 21,563. Porto Rico D. C. U. S. Term No. 767. Tefft, Weller & Co., A. & S. Henry & Co., S. E. Heymann & Co., *et al.*, appellants, *vs.* Julian Munsuri. Filed April 12th, 1909. File No. 21,563.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 767.

TEFT, WELLER & CO., A. & S. HENRY & CO., S. E. HEYMAN & CO., ET AL., APPELLANTS,

vs.

JULIAN MUNSURI, APPELLEE.

Motion and Argument of Julian Munsuri in Support of His Contention That This Appeal Should be Dismissed, for the Reason That This Court is Without Jurisdiction to Consider the Same.

MOTION TO DISMISS.

Now comes Julian Munsuri, the appellee in the above-entitled cause, by Willis Sweet and George H. Lamar, his counsel of record, and moves this court to dismiss the appeal now pending herein for the following reasons:

I.

Because the said appeal is taken from an interlocutory order, disallowing certain claims of the appellants in proceeding in bankruptcy in the District Court of the United States for Porto Rico.

II.

Because if the writ of error be treated as an appeal under section 24*a* of the Bankruptcy Act, then it is not in fact an appeal from the final judgment or decree in a cause, but amounts to a petition to review or revise the action of the District Court of the United States for Porto Rico in disallowing said claims, and if this court is disposed to treat the appeal as of the nature of a petition to review or revise, then it was not taken within the ten days required by the last paragraph of section 25 of the Bankruptcy Act.

III.

Because there is no law authorizing this court to consider appeals from the District Court of Porto Rico in any case. except by appeal or writ of error, and appeals or writs of error to this court must be from final judgments.

WILLIS SWEET,
GEORGE H. LAMAR,
Counsel for Appellee.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 767.

TEFT, WELLER AND COMPANY, A. & S. HENRY AND COMPANY, S. E. HEYMAN AND COMPANY, ET AL., *Appellants,*

vs.

JULIAN MUNSURI, *Appellee.*

GENTLEMEN: Please take notice that the appellee in the above-entitled cause will, on the 17th day of May, 1909, between the hours of 12 o'clock noon and 1 o'clock p. m., or as soon thereafter as counsel can be heard, in the Supreme Court room, in the city of Washington, District of Columbia, in open court, move this court to dismiss the appeal now pending herein for want of jurisdiction.

Together with this notice appellee serves upon counsel of record for the appellants a copy of said motion to be filed in said Supreme Court, which is hereby made a part hereof.

Dated at Washington, D. C., this 24th day of April, A. D. 1909.

WILLIS SWEET,
GEORGE H. LAMAR,
Counsel of Record for Appellee.

To Messrs. WILLIAM H. HAWKINS and WILLIAM G. JOHNSON, counsel for appellants.

Service accepted of a copy of the above motion and notice and brief in support of motion at Washington, D. C., this 24th day of April, 1909.

WILLIAM G. JOHNSON,
Of Counsel for Appellants.

BRIEF IN SUPPORT OF MOTION.

The question presented on this appeal is:

Whether this court has jurisdiction to hear and consider an appeal from the United States District Court for Porto Rico from an order made by said court reversing the referee, disallowing the claims of certain alleged creditors in a bankruptcy proceeding in said court, and directing the referee to proceed accordingly. The fact are:

In the above-entitled proceeding in bankruptcy certain claims of various alleged creditors were presented to the referee in bankruptcy and by him allowed. On the petition of Julian Munsuri, a member of said bankrupt firm, and an interested party, the order of said referee allowing said claims was certified to the said district court for review. At a hearing duly had the district court reversed the order of the referee, and disallowed said claims. Thereupon the creditors against whom the order of said court was directed appealed to this court from the order disallowing their claims, and the further proceedings in bankruptcy were suspended pending the result of said appeal.

Section 24 of the Bankruptcy Act (*a*) and (*b*) is as follows:

"*Jurisdiction of Appellate Courts.*—(*a.*) The Supreme Court of the United States, the circuit courts of appeals of the United States, and the supreme courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the Supreme Court of the District of Columbia.

"(*b.*) The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend

and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved."

Section 25 of the Bankruptcy Act is as follows:

"*Appeals and Writs of Error.*—(*a.*) That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the Circuit Court of Appeals of the United States, and to the Supreme Court of the Territories, in the following cases, to wit, (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.

"(*b.*) From any final decision of a court of appeals, allowing or rejecting a claim under this act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other:

"1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States.

"2. Where some justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States.

"(*c.*) Trustees shall not be required to give bond when they take appeals or sue out writs of error.

"(*d.*) Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of *certiorari* pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted."

Section 24 Treats of General Jurisdiction.

Section 24 of the Bankruptcy Act deals with the subject of appeals in the most general terms so far as the jurisdiction of this court is concerned. Section 24 gives to the Supreme Court "jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases."

In the same general form the Supreme Court of the United States is given jurisdiction of appeals from courts of bankruptcy not within any organized circuit of the United States and from the Supreme Court of the District of Columbia.

Paragraph (*b*) of section 24 gives to the several circuit courts of appeal "jurisdiction in equity, either interlocutory or final, to superintend and revise in matters of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction."

It does not appear from section 24 that the power to superintend or revise bankruptcy proceedings in the lower courts was vested or intended to be vested in the Supreme Court of the United States, while paragraph (*b*) of section 24 amplifies the jurisdiction of the circuit court of appeals, seeming to invest it with the same supervisory control over the proceedings of courts of bankruptcy that are exercised by the district court over the proceedings of the referee in bankruptcy.

Section 25.

Paragraph (*b*) of section 25 defines with precision the nature of appeals that may be had from the circuit court of appeals to the Supreme Court of the United States. These grounds of appeal are specified under subdivisions 1 and 2 of paragraph (*b*) of section 25. The appeal in question cannot be entertained by this court, because it does not come within any provision of the bankruptcy act authorizing it.

Section 24 simply authorizes an appeal to the Supreme Court of the United States from the District Court of Porto Rico sitting as a court of bankruptcy, if it authorizes it at all, under the proviso of said section 24, which gives this court jurisdiction in bankruptcy matters over the courts "not within any organized circuit of the United States," and as Porto Rico is not within any organized circuit of the United States, we will concede, for the sake of the argument, that an appeal in a proper case lies.

In the work of Mr. Collier on Bankruptcy, at page 282 of the fifth edition, a summary is presented, under which is set forth the nature of the appeals that have been allowed under the sections already quoted, as those rights to appeal are construed by the courts:

Appeals May be Had in Bankruptcy:

1. In the Supreme Court of the United States:

(*a*) *By appeal or writ of error,* from a circuit court of appeals, or a district court not within any organized circuit, or the Supreme Court of the District of Columbia, by a party aggrieved by either of the judgments mentioned in section 25*a*, but not otherwise.

(*b*) *By writ of certiorari,* to a circuit court of appeals, if permitted by general law.

(*c*) *By certificate,* from either a circuit court of appeals or a district court direct, if permitted by general law.

2. In a Circuit Court of Appeals:

(*a*) *By appeal or writ of error,* from a district court in its circuit sitting in bankruptcy; if within the limitations of section 25*a*, but not otherwise.

(*b*) *By petition to revise* in matters of law any order of a district court in its circuit sitting in bankruptcy.

3. In the Supreme Court of a Territory:

(*a*) *By appeal or writ of error,* from a district court of the Territory sitting in bankruptcy; if within the limitations of section 25*a*, but not otherwise.

Under the first paragraph alone is stated the ground upon which the party aggrieved by the decision of the United States District Court of Porto Rico may appeal.

The author cites the following cases in support of his theory:

Pirie *v.* Chicago Title and Trust Co., 182 U. S., 438.
White *v.* Scholerb, 178 U. S., 542.
Audubon *v.* Schufeldt, 181 U. S., 575.

Our contention is that the statute in no case authorizes the Supreme Court of the United States to act as a court of revision or review. It is given appellate jurisdiction, as in cases of *appeal or writ of error,* upon the questions specified in subdivision "*a*" of section 25, and in no other case.

Upon bankruptcy appeals to the Supreme Court of the United States, this court has fixed thirty days as the time limit in which an appeal might be taken.

For purposes of revision and review of the identical questions appealable to this court, or which may be reviewed and revised by the circuit court of appeals, any such appeal to the circuit court of appeals must be taken within ten days.

It must have been the meaning of Congress and the purpose of this court to make as speedy as possible the settlement of all controversies arising in courts of bankruptcy. This is illustrated by the fact that appeals or petitions for revision or review must be taken within ten days, and the appellate court under this section of the bankruptcy act may hear and determine the matter appealed "in term or vacation as the case may be."

And this court, limiting the time in which to take an appeal, which we interpret to mean something different from a revision of an interlocutory order or proceeding, reduces the time in which to make the appeal to thirty days.

But it appears that the party aggrieved must come to this court by *appeal or writ of error.* There is no provision in the statute under which a party aggrieved may appeal to this court except by *appeal or writ of error,* and the only

difference between the appeal that is provided under the bankruptcy law for an appeal from the United States District Court for Porto Rico and any other appeal that may be taken from said court in any other cause is that this court has limited the time in which to take the appeal to thirty days; but there is no provision that this court must hear such an appeal "in vacation or term time, as the case may be," and, we repeat, no provision whatever for this court to hear any appeal at all except in form of appeal or writ of error.

THIS APPEAL SHOULD BE DISMISSED BECAUSE IT IS IN THIS COURT AS AN ATTEMPTED APPEAL UNDER THE ORDINARY REQUIREMENTS, WHEN IN FACT IT IS BUT AN INTERLOCUTORY ORDER OF THE COURT BELOW, AND NOT A FINAL JUDGMENT OR DECREE THAT DISPOSES OF THE CAUSE PENDING.

We are unable to find any provision of the United States statute which authorizes or gives to this court jurisdiction to revise or supervise proceedings in bankruptcy, as is contemplated in section 25 of the Bankruptcy Act, which defines the jurisdiction of circuit courts of appeal, and states the conditions under which appeals from the circuit court of appeals may be had to the Supreme Court of the United States. It will be noted that to come from the circuit court of appeals to this court the appeal must be taken within *ten days*, and thus the supervisory powers of the circuit court of appeals are not delayed in this court, and these appeals to the Supreme Court of the United States are limited to so few questions or issues that they are of very rare occurrence.

In the matter at bar the United States District Court for Porto Rico, sitting as a court in bankruptcy, reversed an order of the referee in bankruptcy allowing certain claims, and directed the referee to disallow those claims. From that order the creditors have sought an appeal to this court, tendering the usual supersedeas bond, and the court has

allowed said appeal upon the theory that the same was an appeal from a final judgment of that court.

It is true that the order of the court disallowing the claims in question may have been final as to those claims; it might also be true that in every bankruptcy proceeding of a serious nature, some interested party asks the trial court many times to review certain acts of the referee, and pending such action the proceeding is stopped; and it is also true that the referee may, of his own motion, certify to the district judge questions upon which he is in doubt, and if from these different reviews by the trial court a separate appeal may be had to this court and a supersedeas given, then if there are ten orders made by the district court there may be ten appeals to this court, ten supersedeas bonds issued. and more than twenty years consumed in adjusting a cause in bankruptcy.

It is perfectly evident that such proceeding was not intended by Congress, and it is further evident that this court has sought to carry the same spirit into the act by limiting the time in which appeals may be taken; and it is impossible that this court should attempt to read into the act either the power on its part to review, revise, or supervise proceedings, or to grant appeals and allow supersedeas bonds upon every order made by the trial court during the pendency of long proceeding in bankruptcy.

AN APPEAL FROM THE DISTRICT COURT OF PORTO RICO IN A BANKRUPTCY CASE IS NOT DIFFERENT FROM THE REQUISITES IN ALL OTHER CASES.

The ordinary appeal from the United States District Court for Porto Rico to this court is provided by section 35 of the Foraker Act. This section does not go into details at all; it simply states that such appeals shall be governed by the ordinary appeal from the supreme court of a territory.

Section 701, quoted later, of the Revised Statutes of the United States gives the requirements of an appeal from the

supreme court of a territory, and section 702 provides that the Supreme Court of the United States will review questions of law only from these courts.

Now, Rule 36 provides that in appeals to the Supreme Court under the Bankruptcy Act findings of fact shall be made, and that an appeal shall be taken within thirty days. This rule of the Supreme Court is but uttering this statute in the form of a rule, and this court is also authorized to make the regulation in reference to shortening the time in which an appeal may be taken. This it has done, and so we find that, after all, the only appeal actually allowed to the Supreme Court of the United States from the District Court of Porto Rico in a bankruptcy matter is the same that always has existed by virtue of the Foraker Act.

There is this further provision of law in the act, providing for an appeal from the supreme court of a territory which does not appear in section 24 of the Bankruptcy Act; it is the words "final judgment" which appears in the territorial act.

Our contention is that the appellant in this case could come to this court only upon writ of error or appeal, as required by law, and if he comes under this provision then he must appeal from the *final judgment,* as the rule requires in such cases. Otherwise he must come under a petition to revise, supervise, or review, and this latter proceeding is not authorized by law.

As these creditors do not come into this court under an appeal from a *final judgment,* there is no law giving this court jurisdiction of the questions involved by the appeal, for it involves the question only of revising an order of the court upon one question presented in a bankruptcy proceeding, in which the court directed the referee how to proceed. This order, even though final as to the one question involved, is not the final decree in the case, and, therefore, is without standing in this court.

APPEALS UNDER SECTION 25 OF THE BANKRUPTCY ACT.

Section 25*a* of the Bankruptcy Act is as follows:

That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the Circuit Court of Appeals of the United States, and to the Supreme Court of the Territories, in the following cases, to wit:

(1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt;

(2) From a judgment granting or denying a discharge; and

(3) From a judgment allowing or rejecting a debt or claim of five hundred dollars or over.

Section 25 deals only with appeals to the circuit court of appeals from all courts of bankruptcy, and thus far the act quoted does not differ materially from section 24, already quoted. The last paragraph of subdivision (*a*) of section 25 is as follows:

"Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be."

Under subdivision (*a*) of section 25 no appellate jurisdiction is given to the Supreme Court of the United States for the consideration of the only question involved in this appeal, to wit, "From a judgment allowing or rejecting a debt or claim of five hundred dollars or over." (The statute has been so amended that the sum involved should read five thousand dollars, but as the sum involved in this appeal exceeds that amount, no question is raised on that point.)

We have then subdivision (*b*) of section 24, giving the circuit court of appeals jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction.

Under section 25 of the Bankruptcy Act certain appeals from bankruptcy courts are allowed to circuit courts of appeal, but these appeals must be taken within ten days, as set forth in the paragraph under subdivision (*a*) of section 25 above quoted.

In the matter at bar the appeal was not taken within ten days, and hence if this court should be inclined, under the equitable character of the bankruptcy law and the broad provisions of the Foraker Act, to consider this appeal under section 25, then it becomes impossible to do so, because the provision of the statute requiring such appeal to be taken within ten days was wholly disregarded, and this provision of section 25 was advisedly disregarded by appellants because they have based their right to an appeal upon section 24, rather than upon the provisions of section 25.

Passing to a further consideration of section 25, we find that the Supreme Court of the United States will consider but two questions on appeal from a circuit court of appeals in bankruptcy, and, as the question involved upon this appeal does not come within either of those provisos, it is unnecessary to present them.

The Foraker Act gives to the District Court of the United States for Porto Rico the following jurisdictional powers:

> The district court for said district shall be called the District Court of the United States for Porto Rico, and shall have power to appoint all necessary officials and assistants, * * * and shall have, in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizant in the circuit courts of the United States, and shall proceed therein in the same manner as a circuit court.

Assuming, therefore, that as all appeals from the District Court of the United States for Porto Rico lie to this court direct, and that the District Court of the United States for Porto Rico is vested also with the powers of a circuit court, let us inquire what position appellant is in, if he attempts to maintain the right to appeal in this case under any statute

found in the Bankruptcy Act or in the organic act of Porto Rico, or under the general law granting appeals from territories.

Under the organic act appeals from the District Court of Porto Rico are regulated by section 35, and this section provides—

"That writs of error and appeals from the final decisions of the Supreme Court of Porto Rico and the District Court of the United States shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations and in the same cases as from the supreme courts of the Territories of the United States."

Section 702 of the Revised Statutes is as follows:

"The final judgments and decrees of the supreme court of any Territory, except the Territory of Washington, in cases where the value of the matter in dispute, exclusive of costs, to be ascertained by the oath of either party, or of other competent witnesses, exceeds one thousand dollars, may be reviewed and reversed or affirmed in the Supreme Court, upon writ of error or appeal, in the same manner and under the same regulations as the final judgments and decrees of a circuit court. In the Territory of Washington the value of the matter in dispute must exceed two thousand dollars, exclusive of costs. And any final judgment or decree of the supreme court of said Territory in any cause when the Constitution or a statute or treaty of the United States is brought in question may be reviewed in like manner."

Subdivision 2 of the above section provides that in cases of the character of the one at bar, appellate jurisdiction shall be exercised by writ of error, and the last paragraph of this subdivision requires a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, etc. Subdivision 2 of section 702 is as follows:

"That the appellate jurisdiction of the Supreme Court of the United States over the judgments and decrees of said Territorial courts in cases of trial by jury shall be exercised

by writ of error, and in all other cases by appeal according to such rules and regulations as to forms and modes of proceeding as the said Supreme Court have prescribed or may hereafter prescribe:

"*Provided,* That on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below, and transmitted to the Supreme Court together with the transcript of the proceedings and judgment or decree; but no appellate proceedings in said Supreme Court, heretofore taken upon any such judgment or decree, shall be invalidated by reason of being instituted by writ of error or by appeal."

Rule 36 formulated by this court to govern proceedings in bankruptcy is, so far as the form and procedure is concerned, but a declaration of the U. S. Statutes above quoted; and it is under this rule that *thirty days* is given in which to appeal.

THE RULE OF THE SUPREME COURT DOES NOT CHANGE THE TERMS AND CONDITIONS OF THE ACT.

In the first paragraph of Rule 36, this court in formulating the rule regulating appeals says that the same shall be considered a regulation "except as otherwise provided in the act," etc.

We believe we have demonstrated that this court will not ordinarily entertain on appeal any question of revision or supervision of a proceeding in a court of bankruptcy, by virtue of any authority given under section 24*a* of the bankruptcy act.

Section 24*b* of the bankruptcy act distinguishes the powers of the circuit court from the powers of the Supreme Court, and confers upon the circuit court of appeals the right to revise and supervise proceedings in the courts of bankruptcy.

Passing to section 25*a* of the bankruptcy act, in which a right is given to the circuit court of appeals to consider ap-

peals in bankruptcy, we find the question pending here involved; but we find under the last paragraph of subdivision (*a*) of section 25 that such appeal must be taken within *ten days*. No power whatever is given to the Supreme Court of the United States to consider an appeal from the circuit court of appeals allowing or rejecting any debt or claim.

If this court should hold that because it is the appellate court of the District Court of the United States for Porto Rico, it will consider such appeals as a circuit court would consider if it were the appellate court of the District Court of the United States for Porto Rico, then such an appeal must be considered under the rule which gives an appeal at all upon such questions.

If, therefore, under section 25 this court, conceiving it to be in the interests of justice, and assuming to exercise an appellate function, not because such a power has been granted to this court by the law, but because it has not been granted to any court, and hence the litigant would be without an appeal under such conditions as are stated in section 25, then clearly this court must be governed by the provisions of section 25 and the appeal must be taken *within ten days*, and this court must hear and consider such appeal at term time or in chambers, as provided by the terms of said section.

This appeal, not having been taken within ten days, is therefore subject to dismissal under the provisions of section 25, just as it would be subject to dismissal had the district of Porto Rico been attached to the circuit court of appeals, and the appeal had gone to the right court, but not within the time required by law.

Returning to a consideration of the appeal provided under section 24 of the Bankruptcy Act, we find that it is to be taken by writ of error or appeal as in ordinary cases; and in all cases in which an appeal is taken to this court, the appeal is from a final judgment. This is true under the act granting appeals from the Territories, and it is also true, generally

speaking, with an appeal that is taken from a final judgment or decree.

In subdivision (*b*) of section 25 of the Bankruptcy Act, the language used is as follows:

"from any final decision of a court of appeals, allowing or rejecting a claim under this act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States in the following cases, and no other:"

and then follow the two questions upon which an appeal may be considered by this court under subdivision (*b*).

Subdivision (*b*) refers to an appeal which is in substance and in fact the review or revision provided for in subdivision (*b*) of section 24. If this court should be disposed to consider the appeal under section 25, giving the District Court of the United States for Porto Rico the same status as that of a circuit court of appeals, still the rule which required the appeal to be made within *ten days* was not regarded, and if it be on writ of error like other appeals, as evidently contemplated by section 24, then the appeal was not from a final judgment.

Decree Not Final in Case.

In the case at bar, during the progress of the proceedings before the referee, and before the case had reached that stage where a final order could be passed, concluding the proceedings incident to winding up of the affairs of the bankrupt, the appellee, by petition, secured a certification to the District Court for its review of the referee's action in allowing certain of the pending claims, namely, those of the appellants. The order of the court, in reversing the action of the referee complained of, was, in legal contemplation, an instruction to the referee in making up his accounts to be thereafter submitted to the court for final action, to disallow the claims of the appellants.

If Porto Rico were in a circuit, it is true that the adverse action would have entitled appellants, by speedy proceedings, to have the action of the court below reviewed by the Circuit Court of Appeals and by a judge of this court, if need be, in chambers. But, as has been shown, no such provision is made by the law, as applied to Porto Rico, for a more speedy review or for any review of his decisions, in the allowance or disallowance of claims, except, as in other cases, when all of the proceedings come up for final judgment upon the whole bankruptcy case, a stage in the proceedings which has not yet been reached.

It is not unnatural that the court below should have erred on the side of liberality toward the appellants, in their efforts to have this court substituted for the court of appeals of a circuit in the matter of having his action reviewed in the disallowance of their claim and, therefore, he allowed the appeal; but this appeal was allowed within *ten* days of the time the order of the court appealed from was entered—February 9, 1909. Appellants recognized the fact that this court had no jurisdiction, by analogy, to review the action of the court below as a *quasi* circuit court of appeals, and they made no point of perfecting their appeal by giving bond within the *ten* days, in such cases provided, and did not file such bond until February 23, 1909, *after the expiration of the ten days,* as all of which will appear from the extracts from the record as printed for use in connection with the consideration of this motion to dismiss.

Manifestly the order appealed from was not a final judgment or decree within the meaning of the law which permits appeals to this court, a[illegible]he action of the court in seeking to comply with rule 36 of this court for bankruptcy records on appeal does not make it such.

The above authorities, cited by Mr. Collier in his work on Bankruptcy, in support of his statement that this court will consider an appeal or writ of error only from a final judgment, Audubon *v.* Schufeldt (181 U. S., 575) and other

cases are all cases of a different character from the case at bar, and this court does not therein have occasion to define what constitutes a final judgment in bankruptcy. It does appear that in each of these cases a final decree had been entered, and the whole proceedings in each of these cases were practically at an end so far as the referee and courts below was concerned. Upon such a state of facts a case would come under section 24*a* of the Bankruptcy Act, and it seems to be the only kind of an appeal which this court could consider from the court below.

A final judgment is defined by Bouvier as follows:

"Final judgment is one which puts an end to the suit."

An interlocutory judgment is one given in the progress of a case which is intermediate and does not finally determine or complete the suit.

In Luxton *vs.* North River Bridge Co., 147 U. S., 337, p. 341, Mr. Justice Gray, in delivering the opinion of this court, said:

"The case is not to be sent up in fragments by successive writs of error."

In the California Consolidated Mining Co. *vs.* Charles Manley, sheriff, 203 U. S., 579, this court dismissed a writ of error from the supreme court of a State, and cited numerous authorities in support of this action, because the same was brought to this court before all proceedings were determined in the lower court.

It is clear that the order appealed from was not a final decree within the meaning of the law, as applied to the case at bar, that the appeal was prematurely taken, and that it would be a precedent, out of harmony with the entire spirit of the bankruptcy law to entertain such appeal at this time, and tend to delay the speedy and final determination of bankruptcy cases, if such an appeal should be allowed to

remain on the docket of this court for over a year, while all the proceedings in the court below are being suspended in violation of the letter and spirit of the bankruptcy law.

Wherefore it is respectfully asked that the motion be considered and granted at the earliest practicable time.

WILLIS SWEET,
GEORGE H. LAMAR,
Counsel for Appellee.

NOTICE.

The attention of Counsel is directed to the provisions of the following Rule, which will hereafter be strictly enforced:

Rule 31. All records, arguments, and briefs, printed for the use of the court, must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume; and as well as all quotations contained therein, and the covers thereof, must be printed in clear type (never smaller than small pica) and on unglazed paper.

See also opening paragraph of opinion in *Railroad Co.* v. *Jacobson*, 179 U. S. 294.

(21,563.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 767.

TEFFT, WELLER & CO., A. & S. HENRY & CO., S. E. HEYMANN & CO., ET AL., APPELLANTS,

vs.

JULIAN MUNSURI.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 24, 1909.

(Record, page 53.)

Petition for Review of Referee's Order.

(Filed October 20, 1908.)

In re SUCESORES DE JOSÉ HERNAIZ.

In Bankruptcy.

Petition for Review.

Now at this time comes Julian Munsuri, by his Solicitor, Willis Sweet, and petitioning for the review of an order of the Referee in the above entitled matter, respectfully submits:

I.

That on the 27th day of September, 1906, the mercantile firm of Successores of José Hernaiz & Co. was duly adjudged bankrupt; and in an opinion handed down by said Honorable Court on the 14th day of July, 1908, petitioner was held to be a general partner in said firm.

II.

That on the question of the former settlement and adjudication of the claims, or alleged claims, pending against said bankrupt firm, except the claim of Heller & Long, the Court in said opinion expressed a preference for having said question first passed upon by the Referee; and in accordance with said suggestion, Julian Munsuri, by his attorney, Willis Sweet, appearing specially for that purpose, on the — day of July, 1908, filed a petition with A. Crosas, Referee, praying that the orders theretofore made allowing said claims should be reconsidered, vacated and set aside, and said claims disallowed.

III.

Proceedings were had on said petition, briefs were filed by the respective parties in support of their contentions, and on the 15th day of October, 1908, the Honorable Referee handed down his opinion overruling said motion to disallow said claims.

The main ground for the decision as stated is that there was fraud in the negotiations with the creditors for the purchase of said claims. But there was no fraud, as your petitioner respectfully submits, of whatever character or kind, in negotiating said settlement, but that the whole transaction was fair and entered into by the creditors with a full knowledge of all of the conditions and circumstances of the case; that no misrepresentation or attempt to deceive the creditors were made, and that there is no charge of fraud

in the record, and no evidence whatever of fraud in connection with the transaction.

Wherefore, your petitioner alleges and contends that the Referee erred:

(1.) In finding that there was any fraud in the negotiations or in any part of the transactions had; or that any issue of fraud had been raised.

(2.) In not upholding said transactions and declaring them a bar to the present claims of the alleged creditors concerned;

(3.) In overruling the motion to disallow said claims.

(4.) In holding that the decision of the District Court was not an adjudication.

(5.) In disregarding the question of laches raised by petitioner at said hearing.

And your petitioner therefore prays that you forthwith certify to the Judge the questions involved, together with the evidence relating thereto, and the findings and order made in the premises, to the end that said order of October 15th, 1908, may be reviewed by the Judge of said Court, and, error being found, that it may be vacated and set aside, and proper orders made in accordance with the petition heretofore filed.

WILLIS SWEET,
Attorney for Julian Munsuri, Appearing Specially for the purposes herein set forth.

Accepted service of the foregoing petition by receiving a copy of the same this 21st day of Oct. 1908.

WM. H. HAWKINS.

(Record, page 55.)

In Bankruptcy. No. 22.

In the Matter of SUCESORES DE JOSÉ HERNAIZ, in Liq., Bankrupt.

Certificate of Referee to Judge.

I, Andrés B. Crósas, one of the Referees of said court in bankruptcy, do hereby certify that in the course of the proceedings in the said cause before me a motion was filed on behalf of Julian Munsuri for the reconsideration and disallowance of all the claims filed before me except that of Heller & Long, all of which creditor's claims had been allowed. Hearings were had, evidence submitted and testimony taken for and against said motion, and counsel on both sides submitted briefs. I made a finding of fact and of law and denied the said motion. A petition has been presented asking for a review by the court of the said question on behalf of Julian Munsuri, and the question raised by the said motion is hereby certified to the Judge for his opinion thereon.

I return as the record and transmit herewith the following items:

1. The creditors proofs of claim in question filed and allowed.

2. The motion filed by Julian Munsuri for the reconsideration and disallowance of the said claims.
3. The testimony and exhibits filed in the hearing of said motion.
4. All the testimony and exhibits in the case.
5. The report of the Referee making a finding of fact and of law and denying the said motion.
6. The petition for review by the Judge of said finding and report of the Referee.

ANDRÉS B. CROSAS, *Referee.*

(Filed October 22, 1908.)

(Record, page 57.)

In the District Court of the United States for Porto Rico.

Bankruptcy. No. 22.

In the Matter of SUCESORES DE JOSÉ HERNAIZ, Bankrupts.

Findings of Fact and Conclusions of Law by the Court.

(Filed February 9, 1909.)

In connection with the opinion rendered in the above entitled cause on January 29, 1909, in which the Court gives its reasons why the report of the Referee of October 15, 1908, on the question of the reconsideration and disallowance of the claims of various creditors will be overruled and an order to that effect entered, and in pursuance of General Order in Bankruptcy No. 36, P. 3, providing that a statement of the Findings of Fact and Conclusions of Law be made and filed by the Court, the Court does not quarrel with the Findings of Fact made by the Referee and adopts the same, but reverses and sets aside the Referee's conclusions of law and concludes as a matter of law:

First: that there was not sufficient evidence to warrant the finding of fraud by Munsuri in obtaining the said receipts from the creditors.

Second: that as there was no fraud in obtaining the receipts, said receipts show a settlement that is binding on the creditors and cannot now be set aside.

Third: that as said receipts show a binding settlement, the creditors cannot now put in a claim for the balance, and their claims must, therefore, be disallowed.

Fourth: that the creditors now trying to set aside the settlement and compromise are only a minority of all the creditors and have been guilty of inexcusable laches as shown in our opinion in the files.

B. S. RODEY, *Judge.*

(Record, page 58.)

In re SUCESORES DE JOSÉ HERNAIZ, Bankrupts.

(Not to be printed.)

Memorandum by the Court placed in the files, giving its reasons for overruling the Referee's approval of certain claims.

This matter is before us on appeal from the action of the Referee in approving and allowing certain accounts of creditors. The bankrupt Munsuri objects to the approval of certain of these accounts and introduces receipts and assignments of the same.

It appears that nearly three years ago (see Bankruptcy suit No. 11) several of these creditors filed a petition in involuntary bankruptcy against Sucesores de José Hernaiz, and after considerable pleading was done but without any adjudication or otherwise, notice was sent to all the creditors, and the cause was dismissed by the parties who instituted it.

We have given more than a month's time off and on to an examination of the briefs and authorities and to looking over the evidence, and it is seldom that such a painstaking effort has been made by counsel. Some time since on the motion of a creditor who did not agree to the former bankruptcy proceedings, we held the partner Julian Munsuri to be a general instead of a special partner (see our opinion in the files). Now the creditors who settled with him in the former bankruptcy proceedings and dismissed the proceedings are coming in notwithstanding their settlement and wanting to collect the balance of their claims. Both the referee and their counsel have made a most painstaking search of the books of the concern, and on the theory that because the Court has held that Munsuri was a general instead of a limited partner and because they say fraud was committed in obtaining the settlement, the action of the Referee should be sustained.

We cannot agree to this. None of the former creditors were diligent. And no one but one or two firms were diligent. At this late day it is not easy to tell what the considerations for making that settlement and dismissing the former bankruptcy proceeding were. All the creditors were represented by counsel. Those counsel could just as well have known at that time that Munsuri was guilty of acts that would make him a general instead of a limited partner, yet they did nothing in that regard. There is no evidence of any sufficient fraud in the bringing about of that settlement. Munsuri has not had his day in court on it, neither have these creditors testified in the cause. All the evidence of fraud is made up by the Referee and counsel for the creditors. It is no light matter to go now and take this man Munsuri's private property for the benefit of a lot of creditors who settled with him with their eyes open nearly three years ago, and when every fact that has since been brought out, was staring them in the face at that time.

Counsel for the creditors as well as the Referee simply make a labored effort with a lot of book-keeping to show fraud. In our

opinion above referred to in the files, it will be seen that when we rendered the same we gave no intimation that we would feel ourselves bound to permit these creditors, who settled in the way stated, to come in and prove their claims, but specifically stated that we expressed no opinion as to that. We have looked over the settlement made and examined this question from end to end and our conscience will not permit us on the whole case to permit these creditors to come in now without any real showing by themselves of being misled, deceived or defrauded other than is made by the Referee and their attorneys from the books of the bankrupt concern. No man has to defend until he is properly attacked, and all these entries in the books might be explained were Munsuri here to do so.

The diligent only are favored in law. The approval of these accounts for which receipts and assignments were held by Munsuri and introduced, and on which these few particular creditors got the money three years ago at a time when Munsuri believed himself to be a limited partner and did not know that the law made him liable as a general partner, would in our opinion be wrong and would give them an undue advantage.

Therefore the approval by the Referee of all those previously settled claims is reversed and set aside, and only the accounts of creditors who did not so settle their claims, will be permitted to be allowed, and an order to that effect will be entered.

(Placed in the files under date of Jan. 29, 1909.)

(Record, page 61.)

In Bankruptcy. No. 22.

In the Matter of SUCESORES DE JOSÉ HERNAIZ, Bankrupts.

Order.

(Filed Feb. 9, 1909.)

Now in accordance with the opinion rendered in the above entitled cause on the 29th of January, 1909 in which the Court gave its reasons why the report of the Referee of Oct. 15, 1908, would be overruled and the claims thereby allowed would be disallowed, and the Court having made and filed its findings of fact and conclusions of law in pursuance of the provisions of General Order in Bankruptcy No. 36, paragraph 3, it is

Ordered that the claims of Tefft, Weller & Co., A. & S. Henry & Co., S. E. Heymann & Co., Sherman, Reid & Co. (Sherman & Sons Co.), Bernheimer & Walter, Garner & Co., Sweetser, Pembrook & Co., Everett, Heaney & Co., Grinnell, Willis & Co., Schill, Seebohm & Co., and American Trading Company be and they are hereby disallowed.

B. S. RODEY, *Judge.*

(Record, page 62.)

In Bankruptcy. No. 22.

In the Matter of SUCESORES DE JOSÉ HERNAIZ, Bankrupts.

Petition for Appeal.

And now come the creditors Tefft Weller & Co., A. & S. Henry & Co., S. E. Heymann & Co., Sherman & Sons Co., Bernheimer & Walter, Garner & Co., Sweetser, Pembrook & Co., Everett, Heaney & Co., Grinnell, Willis & Co., Schill, Seebohm & Co., and American Trading Co. and considering themselves aggrieved by the judgment and order made on the 9th of February, 1909 whereby the referee's report denying the motion to disallow the claims of said creditors is reversed and set aside and the said claims are disallowed and they do hereby appeal from said judgment or order of the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, and they pray that this appeal may be allowed, that the amount of the bond necessary to be given in order that the appeal may operate as supersedeas be fixed and that the transcript of the record, proceedings and papers upon which said judgment and order was made, duly authenticated may be sent to the Supreme Court.

WM. H. HAWKINS,
Attorney for Said Creditors.

(Record, page 63.)

In Bankruptcy. No. 22.

In the Matter of SUCESORES DE JOSÉ HERNAIZ, Bankrupts.

Assignment of Errors.

(Filed Feb. 15, 1909.)

And now comes Tefft Weller & Co., A. & S. Henry & Co., S. E. Heymann & Co., Sherman & Sons Co., Bernheimer & Walter, Garner & Co., Sweetser, Pembrook & Co., Everett, Heaney & Co., Grinnell, Willis & Co., Schill, Seebohm & Co., and American Trading Co., creditors of the above named bankrupt firm, by William H. Hawkins their attorney, and assign the following as the errors committed by the Court during the progress of said cause.

First. The Court erred in holding as a conclusion of law that there was not sufficient evidence of fraud in the obtaining of said receipts and assignments from the creditors.

Second. The Court erred in holding as a conclusion of law that the receipts and assignments showed a settlement with the said creditors of their claims that is binding on them.

Third. The Court erred in holding as a conclusion of law that said receipts are bar to the creditors now putting in their claims for the balance.

Fourth. The court erred in holding as a conclusion of law that said creditors have been guilty of inexcusable laches.

WM. H. HAWKINS,
Attorney for Said Creditors.

(Record, page 64.)

In Bankruptcy. No. 22.

In the Matter of SUCESORES DE JOSÉ HERNAIZ, Bankrupts.

Order Allowing Appeal.

(Filed February 15, 1909.)

The creditors herein Tefft, Weller & Co., A. & S. Henry & Co., S. E. Heymann & Co., Sherman & Sons Co., Bernheimer & Walter, Garner & Co., Sweetser, Pembrook & Co., Everett, Heaney & Co., Grinnell, Willis & Co., Schill, Seebohm & Co., and American Trading Co. having heretofore filed herein their petition for an appeal from the judgment and order reversing and setting aside the report of the Referee of October 15th, 1908, and disallowing the claims of the said creditors, and they having filed assignments of errors, and it appearing to the Court that some of the said claims are each in excess of the sum of $5,000 it is hereby,

Ordered, that said appeal be allowed the same to act as supersedeas upon the filing of a bond conditioned as required by law in such cases, in the sum of $5,000 and that a transcript of the record, proceedings, and papers upon which said judgment was made be sent to the Honorable the Supreme Court of the United States.

B. S. RODEY, *Judge.*

(Record, page 65.)

In the District Court of the United States for Porto Rico.

Bankruptcy. No. 22.

In the Matter of SUCESORES DE JOSÉ HERNAIZ, Bankrupt.

Bond on Appeal.

Know all men by these presents, that we, William H. Hawkins, as attorney for Tefft, Weller & Co., A. & S. Henry & Co., S. E. Heymann & Co., Sherman & Sons Co., Bernheimer & Walter, Garner & Co., Sweetser, Pembrook & Co., Everett, Heaney & Co., Grinnell, Willis

& Co., Schill, Seebohm & Co., and the American Trading Co., creditors in the above named cause, as principals, and the American Surety Company of New York, as surety, are held and firmly bound unto John L. Gay, Clerk of the said Court, in the full and just sum of five thousand dollars ($5000) to be paid to the said John L. Gay or his successors in office for the benefit of whom it may concern; to which payment well and truly to be made, we bind ourselves, and our successors, jointly and severally by these presents.

Sealed with our seals and dated this 23rd day of February in the year of our Lord one thousand nine hundred and nine.

Whereas lately at a session of the District Court of the United States for Porto Rico, sitting in bankruptcy, in the matter of Sucesores de José Hernaiz a judgment was rendered against the said creditors, and the said creditors having obtained an appeal and filed a copy thereof in the Clerk's office of the said court to reverse that judgment in the aforesaid matter,

Now therefore the condition of the above obligation is such that if the said creditors shall prosecute their said appeal to effect, and shall answer all the damages and costs that may be awarded against them, if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

WILLIAM H. HAWKINS. [SEAL.]
THE AMERICAN SURETY CO. OF NEW YORK,

[Seal of American Surety Co. of N. Y.]

By H. L. COCHRAN,
Resident Vice-President.

R. H. TODD,
Resident Ass't Secretary.

UNITED STATES OF AMERICA,
Island of Porto Rico, ss:

H. L. Cochrane and Robert H. Todd, being severally duly sworn says each for himself that he is the duly appointed resident vice president, and resident assistant secretary, respectively in Porto Rico of the American Surety Company, a corporation organized under and existing by virtue of the laws of the State of New York, with its home office in the City of New York, and having duly qualified under the laws of Porto Rico to do business in Porto Rico, and that they are duly empowered and authorized to execute the foregoing bond on behalf of said corporation; that said corporation is worth largely in excess of the sum of five thousand ($5000) dollars over and above all debts and liabilities.

H. L. COCHRAN.
R. H. TODD.

Subscribed and sworn to before me this 23rd day of February, 1909.

[Seal of Notary Public, Gabriel Guerra.]

GABRIEL GUERRA.

The above bond is approved by me this 24th day of February, 1909.

B. S. RODEY, *Judge.*

(Record, page 67.)

Bankruptcy. No. 22.

In the Matter of SUCESORES DE JOSÉ HERNAIZ, Bankrupt.

Præcipe for Transcript.

(Filed February 25, 1909.)

To the Clerk:

Please make transcript of the following named papers in the above entitled matter:

1. Petition in voluntary bankruptcy without schedules.
2. Orders of adjudication and of reference.
3. Referee's certified list of creditors filing proofs of debt, filed with Clerk Oct. 12, 1907.
4. Motion by creditors that Munsuri be declared a general partner and ordered to turn over his property to the trustee.
5. Opinion of District Judge, Hon. B. S. Rodey, filed Oct. 25, 1907.
6. Judgment declaring Munsuri a general partner.
7. Order that Munsuri turn over his property to Trustee.
8. Petition of Munsuri with exhibits attached filed with Referee asking disallowance of claims of creditors.
9. Report and finding of Andrés B. Crósas, Esq., Referee, filed Oct. 15, 1908.
10. Petition by Munsuri to review Referee's findings.
11. Referee's certificate to the Court.
12. Findings of Fact and conclusions of law by the Court, with opinion of District Judge, Hon. B. S. Rodey, filed Jan. 29, 1909, attached.
13. Judgment of disallowance of claims entered Feb. 9, 1909.
14. Petition on appeal.
15. Assignment of errors.
16. Allowance of appeal.
17. Citation and acknowledgment of service of same.
18. Bond on appeal.
19. Præcipe for Transcript.
20. Certificate.

And file said transcript with the Clerk of the Supreme Court of the United States.

WM. H. HAWKINS,
Attorney for Creditors.

Dated February 25, 1909.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 767.

TEFT, WELLER & CO., A. & S. HENRY & CO., S. E. HEYMAN & CO., ET AL., APPELLANTS,

vs.

JULIAN MUNSURI, APPELLEE.

REPLY BRIEF OF APPELLEE ON MOTION TO DISMISS.

In support of their contention that this court will entertain an appeal from the District Court of the United States for Porto Rico from an order of that court disallowing the claims of appellants as creditors of a bankrupt firm, appellants cite the decision of this court in the case of Armstrong *v.* Fernandez, 208 U. S., 324, 330, and quote therefrom the following language, to wit:

"This is an appeal from a court of bankruptcy, 'not within any organized circuit of the United States' from a judgment adjudging Pascasio Alvarado, a bankrupt under § 24*a and* § 25*a* of the bankruptcy act, and General Order XXXVI, 3." (Italics supplied.)

As § 25*a* of the bankruptcy act is confined entirely to appeals "to the Circuit Court of Appeals of the United States, and to the Supreme Courts of the Territories," and provides

that "such appeals shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be," it is believed that the words of this court "and § 25*a*" were used by inadvertance and were not intended to establish a precedent unnecessary to a decision of that case and seemingly out of harmony with the provisions of the statutes. This idea is confirmed by the fact that in the brief in this court of the appellant, in the case under discussion (No. 114, October Term, 1907), counsel for appellant in that case relied, for the jurisdiction of this court, entirely upon "General Orders in Bankruptcy XXXVI, subdivisions 2 and 3, in conjunction with the provisions of section 24 of said bankruptcy act and section 35" of the Foraker act.

The language used in said brief of counsel for appellant in the Armstrong case, on the subject of jurisdiction of this court, is found on page 14 thereof and reads in full as follows, to wit:

"As the question of the jurisdiction of this court is always open to inquiry, we will add a word on that point.

"The appeal is taken under the terms and in the manner provided for in General Orders in Bankruptcy XXXVI, subdivisions 2 and 3, in conjunction with the provisions of section 24 of said bankruptcy act and section 35 of the civil government act of Porto Rico (31 Stats. at Large, 85). That the same should be by appeal and not by writ of error was decided in Elliott *v.* Toeppner, U. S., 327."

Appellants cite in their brief the case of Hewett *v.* Berlin Machine Works, 194 U. S., 296, which involved certain issues raised upon the intervening petition of the Berlin Machine Works praying, among other things, to be declared the owner of certain property sought to be sold by the trustee of the bankrupt. From a decision adverse to the trustee in the District Court for the Eastern District of New York, on his application for revision and review, he appealed to the

Circuit Court of Appeals, and from the action of the latter court to the Supreme Court of the United States. In passing upon this case, in delivering the opinion of this court, the Chief Justice, among other things, said:

"And as the Berlin Machine Works asserted title to the property in the possession of the trustee by an intervention raising a *distinct and separable issue*, the controversy may be treated as one of those 'controversies arising in bankruptcy proceedings' over which the Circuit Court of Appeals could, under section 24*a*, exercise appellate jurisdiction as in other cases. Section 25*a* relates to appeals from judgments in certain enumerated *steps* in bankruptcy proceedings, in respect of which *special* provision therefor was required, Holden *v.* Stratton, *supra* (191 U. S., 115), *while section 24a relates to controversies arising in bankruptcy proceedings in the exercise by the bankruptcy courts of the jurisdiction, vested in them at law and in equity by section 2, to settle the estates of bankrupts and to determine controversies in relation thereto.* Hutchinson *v.* Otis, 190 U. S., 552; Burleigh *v.* Foreman, 125 Fed. Rep., 217." (Italics supplied.)

In the case of Hutchinson *v.* Otis, 190 U. S., 552, 556, a distinction was made between a controversy arising in bankruptcy proceedings and a mere "judgment allowing or rejecting a debt or claim," from which a special appeal to the Circuit Court of Appeals is allowed under § 25*a*, 3, of the bankruptcy act; but not to this court from the District Court of the United States for Porto Rico; certainly not until after final judgment on the whole case in the court below.

Realizing the difficulty of appellants in this regard, their counsel cite the case of Gumbel *v.* Pitkin, 113 U. S., 545, in which this court (syllabus) held that—

"When a third party *intervenes in a pending suit*, to claim property in the custody of the marshal by virtue of a writ of attachment issued therein, a judgment dismissing his intervention is final as to that issue; and one distributing the proceeds of the property to other parties is also final."

A very different state of facts and pleadings exist in the case at bar. Here the appellants went before the referee in bankruptcy and filed their claims against a firm which had been declared a bankrupt. The claims of appellants were first allowed by the referee. Upon petition for review of referee's order, the matter was presented to the court below, and its order of February 9, 1909, from which the appeal is taken, simply disallowed the claims of appellants; and the appeal was taken direct to this court, without awaiting further proceedings before the referee, as preliminary to final judgment in the cause. The appellants were only a part of the creditors of the bankrupt, and were in no sense *intervenors*.

As there is no appeal to any Circuit Court of Appeals from Porto Rico, § 25*a*, 3 of the bankruptcy act does not apply, and the appellants should have awaited final judgment before attempting to bring the case before this court.

WILLIS SWEET,
GEORGE H. LAMAR,
Counsel for Appellee.

Office Supreme Court, U. S.
FILED.
MAY 17 1909
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. [redacted] 22

TEFFT, WELLER & COMPANY ET AL., APPELLANTS,

vs.

JULIAN MUNSURI.

Brief for Appellants in Opposition to Motion to Dismiss.

WM. H. HAWKINS,
WM. G. JOHNSON,
Counsel for Appellants.

LAW REPORTER PRINTING CO., WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 767.

TEFFT, WELLER & COMPANY ET AL., APPELLANTS,

vs.

JULIAN MUNSURI.

Brief for Appellants in Opposition to Motion to Dismiss.

Statement.

The appeal in this case is taken from a decree of the district court of the United States for Porto Rico terminating a controversy arising in a bankruptcy proceeding (Rec., pp. 34–5).

On September 26, 1906, a voluntary petition for adjudication in bankruptcy was filed in the court below in behalf of the firm Sucesores de José Hernaiz, alleged to be composed of José Truebas Munsuri, general partner, and Julian Munsuri y Hernaiz, limited partner. On the same day an order was passed by which said firm was adjudged a bankrupt (Rec., p. 2).

On the 29th of September, 1906, an order was passed appointing Andres B. Crosas referee (Rec., p. 3), and subsequently the claims of all the appellants were proved and allowed (Rec., pp. 3–4).

On October 22, 1907, a motion was filed in behalf of appellants that Julian Munsuri y Hernaiz be adjudged a full or general partner in the firm and generally liable to the full extent of his property for the payment of the just debts of the firm (Rec., p. 3). On October 25, 1907, the court granted this motion, and entered a decree accordingly (Rec., p. 7).

On July 29, 1908, Julian Munsuri filed a petition before the referee (Rec., pp. 8–13), with exhibits (Rec., pp. 14–20), in which petition he denied his liability as a general partner, and also set up a settlement of appellants claims, by payment pending a former bankruptcy proceeding, against the same firm, but which proceeding was dismissed by the petitioning creditor, and he prayed as to the claims of these appellants (specifically naming all of them)—

> "that the orders heretofore made allowing said claims be reconsidered, vacated, and set aside and that said claims be disallowed" (Rec., p. 13).

On October 15, 1908, the referee made his report, including findings of fact and conclusions of law (Rec., pp. 20–29), and decided that "the motion to disallow the claims is overruled" (Rec., p. 29).

On October 20, 1908, Julian Munsuri filed in the court a petition for review of the referee's order (Rec., pp. 30–31).

On February 9, 1909, the court filed its findings of fact and conclusions of law, in which it adopted the findings of fact of the referee, saying (Rec., p. 32):

> "The court does not quarrel with the findings of fact made by the referee and adopts the same, but reverses and sets aside the referee's conclusions of law,"

and then sets forth its own conclusions of law, with its reasons therefor (Rec., pp. 32–34).

Thereupon, on February 9, 1909, the court entered an order reciting its previous action and concluding thus (Rec., p. 34):

> "Ordered that the claims of Tefft, Weller & Co., A. S. Henry & Co., S. E. Hymann & Co., Sherman, Reid & Co. (Sherman & Sons Co.), Bernheimer & Walter, Garner & Co., Sweetser, Pembrook & Co., Everett, Heaney & Co., Grinnell, Willis & Co., Schill, Seebohm & Co., and American Trading Company be and they are hereby disallowed."

On February 15, 1909, appellants filed their petition for allowance of an appeal with assignment of errors (Rec., pp. 34-5) which appeal was allowed by order of the court passed February 15, 1909 (Rec., pp. 35-6) and the bond on appeal approved February 24, 1909 (Rec., pp. 36-7).

The appellee now moves to dismiss this appeal.

1. "Because the said appeal is from an interlocutory order" (Motion, p. 1).

2. Because if an appeal under section 24*a* of the Bankruptcy Act it is not an appeal, but a petition to review or revise, and if that it is not taken within ten days (Motion, p. 2).

3. Because appeals to this court from the District Court of Porto Rico must be from final judgment (Motion, p. 2).

ARGUMENT.

The Bankruptcy Act was approved July 1, 1898, before the United States had acquired sovereignty over Porto Rico, and of course that territory and its judicial system are not specifically provided for in the act.

By section thirty-four of the act of April 12, 1900, (31 Stat., p. 84), commonly styled the "Foraker Act," Porto Rico was constituted "a judicial district," to be

called "the district of Porto Rico," and a judicial system was created therein, consisting of "a district court," and it was provided that said district court should have "the ordinary jurisdiction of the district courts of the United States."

The Bankruptcy Act (secs. 1 and 2, 30 Stat., pp. 544–5), invested the district courts of the United States with original jurisdiction in bankruptcy, and it is through the provisions of these two acts that the district court of the United States for the district of Porto Rico exercises jurisdiction in bankruptcy.

It is clear, from the provisions of sections 24*a*, 24*b*, and 25 (30 Stat., 553) of the Bankruptcy Act that Congress did not intend that the decisions of the district courts sitting as courts in bankruptcy should be final and unappealable, and it becomes important therefore to determine what provisions for appeal are made which are applicable to the district court of the United States for Porto Rico.

That no appeal lies from that court to any circuit court of appeals has already been decided by this court in the case of Royal Insurance Co. *vs.* Martin, 192 U. S., 149, in which case Mr. Justice Harlan says (p. 160):

> "In our opinion, Congress did not intend that any connection should exist between the United States Court for Porto Rico and any circuit court of appeals established under the act of 1891."

Of course there could be no appeal from the district court of the United States for Porto Rico to the Supreme Court of a Territory, as it is not within any Territory. Unless, therefore, there be a right of appeal direct to this court, the decisions rendered by the district court of the United States for Porto Rico, when sitting as a bankruptcy court, would be final and unappealable. It is important, therefore, to notice

what provision is made for the review, by this Court, of the judgments and decrees of the district court of the United States for Porto Rico.

Section 24*a* of the Bankruptcy Act invests this court—

> "with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases;"

And also with—

> "a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States" (30 Stat., 553).

Section thirty-five of the "Foraker Act" (31 Stats., p. 85) provides that:

> "Writs of error and appeals from the final decisions of the Supreme Court of Porto Rico and the District Court of the United States shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations and in the same cases as from the supreme courts of the Territories of the United States; and such writs of error and appeal shall be allowed in all cases where the Constitution of the United States, or a treaty thereof, or an act of Congress is brought in question and the right claimed thereunder is denied."

So, whether the district court of the United States for Porto Rico be regarded as a court over which this court has "appellate jurisdiction in other cases," or as a court "not in any organized circuit of the United States," as it was held to be, by this Court, in the case of Armstrong *vs.* Fernandez, 208 U. S., 324, 330, in either view this court has, under the Bankruptcy Act, "appellate jurisdiction of controversies arising in bankruptcy proceedings" therein, as well as the appellate jurisdiction conferred by the thirty-fifth section of the Foraker Act.

Whether the appeal be viewed as under the Bankruptcy Act or under section 35 of the Foraker Act, it is respectfully submitted that this court has jurisdiction, by direct appeal, from that court.

I.

Jurisdiction Under the Bankruptcy Act.

Section 24*a* of the Bankruptcy Act, in express terms, gives this court appellate jurisdiction over "controversies arising in bankruptcy proceedings." Was this, then, one of the "controversies arising in bankruptcy proceedings" within the meaning of the act? The statute does not define or describe, in any way, the "controversies" which are the subject of the enactment and it becomes material to consider the exact nature of the questions involved in the court below, how they arose, and how they were settled.

In the original petition it is seen that Julian Munsuri, claimed to be a *limited partner* in the firm of petitioners (Rec., p. 1). Thereupon, appellants, through their counsel, applied to the court to have Munsuri adjudged not to be a *special* partner in the firm but that he declared to be a full or *general* partner, *generally liable, to the full extent of his property* for the payment of the just debts of the firm, and that he be ordered to deliver to the trustee all his property not exempt (Rec., p. 4).

After full hearing the court delivered an opinion holding that Munsuri was a general partner and as such was liable to the full extent of his property (Rec., pp. 4–6), and entered an order to that effect and also one requiring him to deliver his property to the trustee and enjoining him from selling, encumbering, or in any way disposing of his property (Rec., p. 7).

Thereupon Munsuri filed a petition in which he denied the right of the court to hold him as a general partner and also set up a release and discharge from appellants, filing with said petition the alleged receipts of appellants for the sums paid them in settlement. And it was upon these grounds that he prayed the disallowance of said claims (Rec., pp. 8–20). The referee denied the petition holding that the receipts and settlement had been obtained by fraud (Rec., pp. 20–29).

A petition for review was then filed by Munsuri (Rec., pp. 30–31) and the court thereupon sustained the referee's findings of fact, but reversed his conclusions of law, holding that the receipts were a binding settlement (Rec., p. 32).

Thus it is seen that the controversy arising in these proceedings involves not only the disallowance of these claims, but, also, the liability of Munsuri, as a general partner, and the validity of the alleged receipts set up in discharge and the right of the trustee to hold his property for the debts of the firm.

The injunction, restraining him from disposing of his property and the order to deliver up his property to the trustee, had already been passed, and the order appealed from finally annihilated all rights of the appellants to hold him liable and to subject his property to the satisfaction of the firm's creditors.

In the case of Hewit *vs.* Berline Machine Works, 194 U. S., 296, the referee sought to sell certain real and personal property, alleged to be the property of the bankrupt and the Berline Machine Works, a corporation, filed its petition to have the machinery or its proceeds delivered to them as its owners, which claim was denied by the trustee, but sustained by the court. An appeal was taken to the Circuit Court of Appeals and thence to this court.

This Court affirmed the judgment, saying, through Mr. Chief Justice Fuller (p. 300):

> "As the Berline Machine Works asserted title to the property in the possession of the trustee by an intervention raising a distinct and separable issue, the controversy may be treated as one of those 'controversies arising in bankruptcy proceedings' over which the Circuit Court of Appeals could, under section 24*a*, exercise appellate jurisdiction as in other cases. Section 25*a* relates to appeals from judgments in certain enumerated steps in bankruptcy proceedings, in respect of which special provision was required (*Holden* vs. *Stratton, supra*), while section 24*a* relates to controversies arising in bankruptcy proceedings in the exercise by the bankruptcy courts of the jurisdiction, vested in them at law and in equity by section 2, to settle the estates of bankrupts and to determine controversies in relation thereto."

Here was involved a very important controversy, plainly separable and clearly arising under section 2 of the Bankruptcy Act, involving the questions of the liability of Munsuri, as a general partner, the subjection of his individual property to the payment of debts of the bankrupt firm, the validity of the alleged settlement, and the allowance of appellants' claims.

While the claims of appellants were disallowed by the order appealed from, the real controversy, as shown by the record, was not over the amount or original validity of the claims, but was as to whether Munsuri's individual property could be brought in and subjected to the debts of the firm, and as to whether an alleged settlement was valid.

That an appeal would lie, in a case of this character, from any other district court of the United States to a Circuit Court of Appeals or to the Supreme Court of a Territory can not be questioned.

That Congress intended an exception in the case of the district court of the United States for Porto Rico; that no appeal should lie in such a case to this court, the only court having appellate jurisdiction over it, and that its judgment should be final and unappealable, is too unreasonable to be admitted.

Section 25*a* of the Bankruptcy Act gives the right of appeal from the Courts of Bankruptcy—

> "(1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over."

It is true that the appeals in this section mentioned are "to the Circuit Court of Appeals of the United States and to the Supreme Court of the Territories," but it is respectfully submitted, that the primary purpose of the section is to define the class of questions decided by the courts of bankruptcy which may be reviewed on appeal, and not to limit the courts having the appellate jurisdiction; so that it was not the intent of Congress in section 25*a* to give a right of appeal from a judgment adjudging one a bankrupt, or disallowing a claim, where the bankruptcy court was within an organized circuit or in a territory, and to deny it in all other cases. In other words section 25*a* must be treated as supplementary to section 24*a* in respect to those courts of bankruptcy from which a direct appeal to this court is the only right of appeal given.

It would seem that this was the view of the law taken by this court in the case of Armstrong *vs.* Fernandez, 208 U. S., 324, which was a direct appeal from the district court of the United States for Porto Rico.

In that case the appeal was from an order adjudging

the defendant a bankrupt and the court in disposing of it says, through Mr. Chief Justice Fuller (p. 330):

> "This is an appeal from a court of bankruptcy, 'not within any organized circuit of the United States,' from a judgment adjudging Pascasio Alvarado, a bankrupt *under section 24a and section 25a* of the Bankruptcy Act, and General Order XXXVI 3."

If, therefore, sections 24*a* and 25*a* are to be read together to give this court jurisdiction of an appeal from the district court of the United States for Porto Rico in the case of a judgment adjudging one a bankrupt, as specified in section 25*a*, it must extend to a judgment disallowing a claim, as specified in the same section.

As the decree appealed from is one specifically disallowing the claims of appellants, it is respectfully submitted that this court has jurisdiction under the Bankruptcy Act.

II.

Jurisdiction Under the Foraker Act.

The only suggestion against the right of appeal in this case under section 35 of the Foraker Act, if it be considered as dependent upon that statute, is the claim that the judgment is not a final judgment.

But this contention is founded upon a misconception of the nature of the proceeding.

This controversy arises out of an application to subject the individual property of Munsuri, not brought in by the petition in bankruptcy, to the satisfaction of creditors, and this right after being once granted is then denied on the intervening petition of Munsuri. In such a case there is clearly involved a separable controversy and the judgment is clearly final. An affirmance here would require nothing to be done by the court below.

The suggestion that the order is but interlocutory is met by the decision of this court in the case of Gumbel *vs.* Pitkin, 113 U. S., 545.

In that case creditors of Joseph Dreyfus had sued in the Circuit Court of the United States and a writ of attachment was issued and levied upon goods of Dreyfus by the marshal who took possession of them.

Gumbel intervened by petition, alleging a prior seizure by the sheriff in his favor under a writ of the State court, and he claimed priority of lien on the goods. Gumbel's petition was dismissed, on the ground that the sheriff had made no seizure prior to that of the marshal, and the proceeds of the sale of the goods distributed to other parties.

A motion was made to dismiss the writ of error, on the ground, among others, that the judgment was not final. The court, by Mr. Justice Miller, says (p. 548):

> "The order dismissing Gumbell's intervention *disposes of his rights*, and is a *final judgment as to that issue*, as to which he has a right to a writ of error. The order distributing the proceeds of sale is also final, as it disposes of the fund."

In that case, as here, the whole proceeding was not concluded, but the only controversy, as far as the right to that property was concerned, was finally closed.

The order appealed from of itself, and without any further order to be made in the proceedings, terminates all rights and interests of these appellants in the property of Munsuri and in the proceeding, and eliminates them as completely from all future interest or part in the proceedings as if they had never appeared in the case. *No future order* of the court could be the subject of an appeal by them, because it could not in anywise affect their interests or rights or add anything to the force and effect of the order appealed from, and there would be nothing to appeal against.

If they are to have a remedy by appeal at all, it must be from an order which, finally, injuriously affects their rights, and any appeal to this court must be taken withn thirty days from the entry of the decree appealed from, or it can not be taken at all.

III.

The Appeal Was Taken in Time.

Appellee, in his motion to dismiss, insists that this appeal should have been taken within *ten* days. The ten days mentioned in the statute is not applied to direct appeals to this court, while General Order XXXVI, 2, provides that—

> "Appeals under the act to the Supreme Court of the United States . . . *from any court of bankruptcy whatever*, shall be taken within *thirty* days after the judgment or decree."

The appeal in this case was in fact taken within ten days. The decree was entered February 9, 1909 (Rec., p. 34). The appeal was noted, assignment of errors filed and appeal allowed by the court February 15, 1909 (Rec., pp. 34–6). The bond was not filed and approved until February 24, 1909 (Rec., pp. 36–7), but this was not necessary to constitute a taking of the appeal.

Peugh *vs.* Davis, 110 U. S., 227.
Dodge *vs.* Knowles, 114 U. S., 430.

It is respectfully submitted that the motion to dismiss is unfounded and should be denied.

WM. H. HAWKINS,
WM. G. JOHNSON,
Counsel for Appellants.

Office Supreme Court U. S.
FILED
OCT 30 1911
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

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No. 22.

TEFFT, WELLER & CO. ET AL., APPELLANTS,

vs.

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Supplemental Brief for Appellants On Motion to Dismiss.

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THE LAW REPORTER PRINTING COMPANY, WASHINGTON, D. C.

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Supplemental Brief for Appellants On Motion to Dismiss.

A motion to dismiss this cause for want of jurisdiction in this court was made at the October term, 1908, and submitted on May 17, 1909. The court postponed the disposition of this motion until after the hearing on the merits.

Only three grounds for dismissal were suggested by the motion and brief in support thereof; namely (1), that the appeal is from an interlocutory order; (2) that the appeal was not taken within ten days, and (3) because no law authorized appeals except from final judgments (Motion, pp. 1 and 2).

Counsel for appellants were advised on the 27th of October, 1911, by counsel for appellee, that the dismissal of the appeal would be urged upon the following further grounds:

1. That this appeal was taken and prosecuted by appellants in their trade names of Tefft, Weller & Co., etc.,

without disclosing whether they were corporations or partnerships; and, if the latter, without enumerating, by name, the individual members of the firms.

2. Because the bond on appeal is defective.

3. Because of the failure to make parties to the appeal Heller & Long and the trustee in bankruptcy.

These new objections will now be considered, though counsel for appellants are without the advantage of the brief for appellees on this subject.

I.

It is true that in the prayer for appeal (Rec., p. 34), assignment of errors (Rec., p. 35), order allowing appeal (Rec., pp. 35–6), bond (Rec., p. 36), and citation (Rec., pp. 38–9), all the appellants are described only by their trade names. But this is not all that is shown by the record. The record shows also that *throughout the entire proceedings the appellants were so named and described, and never, in any instance, otherwise described.* Thus, they appear first in the list of debts proved before the referee as certified by him (Rec., pp. 3–4). Next in the petition of the appellee, Munsuri, praying to have their claims disallowed, they are so designated (Rec., pp. 11, 13). Again, in the report of the referee allowing their claims (Rec., p. 21), and finally in the *decree* from which this appeal is taken, they are also so designated and in no other way (Rec., p. 34).

The objection by the appellees is, therefore, that appellants are not to be permitted to prosecute this appeal in the only names and under the only appellations or descriptions by which they are known or indicated in the record, at any stage of the proceedings, and by and under which only they have proceeded and been proceeded against in the court below.

These exact conditions existed in the case of Gumbel *vs.* Pitkin, 113 U.S., 545, and among the causes assigned

in a motion to dismiss it was averred as follows (p. 547):

> "3. The writ of error does not set forth the names of the members of the several firms mentioned in the writ as defendants, and there is nothing in the record by which this irregularity may be corrected."

In denying the motion to dismiss, upon the foregoing ground, this court, after saying that leave would be given to amend the writ if there were anything in the record by which to amend, said (pp. 548–9):

> "But the transcript of record before us shows that these parties came into the Circuit Court as defendants or intervenors, and prosecuted their rights throughout the whole proceedings by the designations applied to them in this writ of error and by no other names whatever."

The opinion further says (p. 549):

> "If the plaintiff in error has a just foundation for his assertion of error in the judgment against him, it would be a great and apparently irremediable injustice to dismiss his writ. . . . In this case the plaintiff in error gives his own full name and he is the only plaintiff. He describes in his writ of error all the parties opposed to him, by the names and designations which they gave themselves in their pleadings, motions, and proceedings in the court below, and by which they are mentioned in the judgment which distributes to them the money that he asserts should rightfully go to him. We are not advised, as in the Freeborn case, by the record that the appellants had other names than Freeborn & Co., nor, as in the Darneal case, that there were others who were attempted to be made parties by that word, with no other designation.
>
> "We think that, where the writ gives all the names of the parties *as they are found in the record of the case* in the Circuit Court, and where

> there is nothing to show that any other person was a party than such as are so named, this court is not at liberty to indulge the presumption that there were others who were parties, when such presumption is not founded on anything in the record and would lead to manifest injustice."

It is respectfully submitted that if these names, by which the appellants appeared and proved their claims and had the same allowed (Rec., pp. 3–4), were supposed not to describe legal entities capable of pleading and being impleaded, that objection should have been made then in the court below, and it is too late to make such an objection in the appellate court, especially where there is nothing in the record to show that they had not the legal competence to sue and be sued by those names, and their supposed incompetency can only be a matter of surmise.

When the appellee, Munsuri, attacked them and sought to have their claims disallowed by the referee after they had been allowed, he attacked them by the same names and designations shown in this appeal (Rec., p. 13), and when he appealed to the court from the referee to have their claims disallowed, he was content to have the judgment disallowing their claims entered against them by the same names and designations (Rec., p. 34) as they appear in this appeal.

II.

It is further objected that the bond in the case is defective, and that for that reason the appeal should be dismissed.

Two objections are understood to be made to the bond (*a*), that the principal in the bond is William H. Hawkins, as attorney for Tefft, Weller & Co., etc., the several appellants, while the bond is executed by Hawkins, individually, and not as attorney for the appel-

lants, and (*b*) that the obligee of the bond is "John L. Gay, clerk of the said court," and the indemnity of the bond is—

> "to be paid to the said John L. Gay or his successors in office for the benefit of whom it may concern."

(*a*) It is true that the bond discloses the formal features complained of, but it is respectfully submitted that they do not furnish ground for dismissing the appeal. The bond is not invalid, in this form, as even if it could not be considered as the bond of any one but the signers, Hawkins and the surety company, it was *approved by the court below* (Rec., p. 37), this would make it sufficient under the ruling of this court.

In Brockett *vs.* Brockett, 2 How., 238, this court, speaking by Mr. Justice Story, said (p. 240):

> "A motion has been made to dismiss this appeal upon several grounds. The first is, that although all the defendants have appealed from the decree of the court below, yet a part of them, only, have signed the appeal bond. This objection is not maintainable. It is not necessary that all the defendants should join in the appeal bond, although all must join in the appeal. It is sufficient if the appeal bond is *approved by the court, as satisfactory and complete security*, by *whomsoever it may be executed.*"

(*b*) The second objection, that the bond is made payable to the clerk and his successors in office for the use of whom it may concern, is not a sufficient ground for dismissing the appeal. The recitals of the bond show that it is to answer all damages and costs which may be awarded against the appellants. The bond is entitled in the cause and the appellants are all severally named in the bond as "creditors in the above-named cause" (Rec., p. 36) and the bond recites that a judgment was

rendered "against the said creditors," and that "the said creditors" have "obtained an appeal" "to reverse that judgment" and is conditioned that "the said creditors shall prosecute their said appeal to effect" (Rec., p. 36.)

It is respectfully submitted that as appellants in this or in any other cause could have no liability on an appeal, except for "all the damages and costs that may be awarded against them," and as this bond is conditioned to answer that precise thing, it is sufficient.

But even if the bond were absolutely void, that fact would not constitute ground for dismissing the appeal, as the court could require appellants to enter into a new bond now, which they tender themselves ready to do if required by the court. This position is sustained by many decisions of this court.

In Bigler *vs.* Waller, 12 Wall., 142, where the bond was void because both the obligees named in the bond were dead before the bond was given and before the decree (Rec., p. 147), the court refused to dismiss the appeal and said (Rec., p. 149):

> "Argument to show that the bond in this case is irregular and defective is unnecessary, as it is clear that it should be given to the opposite party or parties in the suit, but it does not follow, by any means, that the appeal must be dismissed. On the contrary, it is the constant practice of the court to allow such defects to be obviated by granting leave to the appellant or plaintiff in error to file a new bond within a reasonable time, to be fixed by the court, in view of all the circumstances when the application is made."

So, in Anson *vs.* Blue Ridge R. R. Co., 23 How., 1, where no bond at all was given, the court refused to dismiss the appeal, and allowed sixty days to appellant to give a bond.

So, also, in Peugh *vs.* Davis, 110 U.S., 227, it was held that where no bond at all was taken the defect could be remedied later, the court saying (p. 229):

> "In view of these rulings we hold that if a court in session and acting judicially allows an appeal which is entered of record without taking a bond within sixty days after rendering a decree, a justice or judge of the appellate court may, in his discretion, grant a supersedeas after the expiration of that time, under the provisions of sec. 1007 of the Revised Statutes. Nothing here said is to be construed as affecting appeals other than such as are allowed by the court acting judicially and in term time."

In Union Pacific Railway Co. *vs.* Callaghan, 161 U. S., 91, in which a motion to dismiss or affirm was submitted, Mr. Chief Justice Fuller said (p. 95):

> "We should not dismiss this writ of error on account of the defective character of the bond but allow a proper bond to be filed, if necessary, which in this instance it is not, as the motion to affirm must be sustained."

There can be no question that in this case the appellants have acted in good faith and sincerely endeavored to do all that was requisite to prosecute the appeal. The decree was entered February 9, 1909, the appeal taken and allowed and assignment of errors filed February 15, 1909 (Rec., pp. 34–6); the bond with a corporate surety given and approved February 24, 1909 (Rec., pp. 36–7), the præcipe for transcript of record given February 25, 1909 (Rec., p. 37). The transcript was completed and certified by the clerk March 24, 1909 (Rec., p. 38), and the transcript filed with the clerk of this court April 12, 1909 (Rec., p. 40).

If therefore the court should consider the bond as defective, it is an eminently proper case in which to allow

a new bond to be filed. And especially is this so, when, as in this case, though a motion to dismiss was submitted in May, 1909, *no objection to the bond was made at that time.*

III.

The third ground, which counsel for appellants are advised will be urged by the appellees as a reason for dismissing this appeal, is that Heller & Long, a creditor of the bankrupt firm, a party to the cause in the court below and the trustee in bankrupcy, are not made parties to this appeal, either as appellants or appellees, and are not named in the citation.

The theory of this objection appears to be that every party to a cause must be made a party in appellate proceedings, either as appellant or appellee. This, it is submitted, is an erroneous view of the law. The true rule is that only those parties to the cause who are also parties to the *decree*, by being parties to the *controversy out of which the decree arises*, are proper parties on appeal. The reason being that no one is a proper party on appeal who has not the right to insist upon the affirmance or reversal of the decree.

A ready solution of the question will be found when the case disclosed by this record is properly understood.

With reference to the trustee in bankruptcy, it is obvious that as the decree appealed from involves no question touching the title or possession of the trustee or of the bankrupt firm, but only the right of appellants to participate in the distribution of the fund among creditors, the trustee has no interest apart from his *cestui que trust*, the creditors. As shown by the record, there are but thirteen creditors who proved claims against the estate (Rec., p. 3). Of these one, Munsuri, is a party appellee, and eleven are appellants. This leaves but one

of his *cestuis que trust*, Heller & Long, not a party to the appeal. If the record shows no right in Heller & Long to be a party to the appeal, then, clearly, the trustee in bankruptcy, in his capacity as trustee for Heller & Long, is neither a necessary nor proper party.

It is clear, of course, that every creditor had the *right* to contest the allowance of the appellants' claims, but no creditor was *compelled* to contest claims which he believed to be just or which he did not choose to contest; on the contrary, one or more creditors could *consent* to the allowance of appellants' claims, although others contested them.

The record shows that Munsuri alone contested appellants' claims and that the decree appealed from was rendered in a contest between Munsuri on the one hand and the appellants on the other, and that Heller & Long were not parties to that controversy.

Appellants' claims were allowed by the referee on May 13, 1907 (Rec., p. 2), and on July 29, 1908, Munsuri filed his petition before the referee (Rec., pp. 8–14) setting forth *his* objections to the allowance of appellants' claims and praying that—

> "the orders heretofore made allowing said claims be reconsidered, vacated and set aside, and that said claims be disallowed" (Rec., p. 13).

In this objection no other creditor joined.

On October 15, 1908, the referee filed his report with his findings of fact and conclusions of law (Rec., pp. 20–29) in which he says that the matter came before him on—

> "a motion by *Julian Munsuri* in the course of the proceedings in this cause for the reconsideration and disallowance of the claims of A. S. Henry & Co. (Rec. p. 21), etc., etc.,

naming all the appellants, and in his conclusions he rules that Munsuri's objections are invalid and "the motion to

disallow the claims is overruled" (Rec., p. 29). Thereupon, Munsuri filed a petition for review by the court (Rec., pp. 30–31) and the referee certified his proceedings to the court (Rec., pp. 31–2).

The court filed its opinion giving its reasons for reversing the action of the referee (Rec., pp. 32–4) in which the court says (Rec., p. 32):

> "This matter is before us on an appeal from the action of the referee in approving and allowing certain accounts of creditors. The bankrupt *Munsuri objects* to the approval of certain of these accounts and *introduces receipts and assignments of the same.*"

Thereupon, on the 9th of February, 1909, the court entered the decree appealed from, disallowing appellants' claims.

Of course, it would have been perfectly competent for Heller & Long to have joined in this contest against appellants, but Heller & Long did not do so. Not only does the record show that Heller & Long did not take part in this controversy or oppose the appellants' claims, but the record shows that appellants had the active cooperation and support of Heller & Long in the establishment of their claims. The appellee, Munsuri, in his petition for disallowance says (Rec., p. 10):

> "William H. Hawkins, Esq., an attorney of said court, appeared as attorney for Heller & Long and presented their claim for $1,293. A trustee was appointed, and then Mr. Hawkins, always having his appearance specified as being for Heller & Long, proceeded with a long examination of said Trueba and other witnesses. . . . There was nothing to indicate what afterwards appears to have been all the time the purpose of counsel for Heller & Long, to wit: To again make claim for all of the debts settled by Munsuri as hereinbefore set forth."

The petition then sets forth the list of all the claims proved, including those of appellants, which he claimed had been settled, and adds (Rec., p. 11):

> "Thereupon, immediately following said examination, the said attorney for Heller & Long presented said claims above recited."

It is thus plain upon Munsuri's own contentions on the record that the decree appealed from was a controversy to which no other creditors than Munsuri and the appellants were parties; that Munsuri, alone, of all the creditors, opposed appellants' claims, and that Heller & Long, though not parties to the controversy, through their counsel, assented to and cooperated in the allowance of appellants' claims.

Under these conditions it is clear that neither Heller & Long, nor the trustee in bankruptcy, are either necessary or proper parties to this appeal, or could question the decree.

In the case of Winters *vs.* United States, 207 U. S., 564, this court, by Mr. Justice McKenna, says (p. 574):

> "The rule which requires the parties to a judgment or decree to join in an appeal or writ of error, or be detached from the right by some proper proceeding, or by their renunciation, is firmly established. But the rule only applies to joint judgments or decrees. In other words, when the interest of a defendant is separate from that of other defendants he may appeal without them."

In many other cases this court has held that where, in a cause having many parties, there was a separate controversy between some but not all of the parties, the parties to that controversy could prosecute an appeal without bringing up the other parties or non-combatants.

Germain *vs.* Mason, 12 Wall., 259, 261.
Milner *vs.* Meek, 95 U. S., 252–258.
Basket *vs.* Haskell, 107 U. S., 602–608.
Hanrick *vs.* Patrick, 119 U. S., 156, 163–4.

It must be remembered that the claim of Heller & Long was not controverted by any one. Munsuri had not settled with Heller & Long, as he admits in his petition (Rec., pp. 9–10), and in his objections and request for disallowance he specifies the appellants as the only creditors to whose claims he objects (Rec., p. 13). Because Heller & Long's claim was not contested by any one and they had no controversy with the appellants, counsel for Heller & Long was free to represent both the appellants and Heller & Long without any conflict of duty.

It is respectfully submitted that Heller & Long, not having been parties to any controversy in the court below, but having assented to the course pursued by appellants in the appellants' controversy with Munsuri, neither they nor the trustee in bankruptcy, as trustee for them, was a proper party to this appeal.

WM. H. HAWKINS,
WM. G. JOHNSON,
Counsel for Appellants.

Office Supreme Court U. S.
FILED
OCT 31 1911
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

No. 22.

TIFFT, WELLER & CO.
vs.
MUNSURI ET AL.

AUTHORITIES CITED IN ARGUMENT.

DUE PROCESS OF LAW.

Effect of hearing under §21, Bankruptcy law:
In re Rosser (C. C. A.), 101 Fed., 568-9.

Principle involved:
Windsor *vs.* McVeigh, 93 U. S., 274, 277-8.
Hovey *vs.* Elliott, 167 U. S., 409, 414.

Issues and character of averments:
Very *vs.* Levy, 13 How., 345, 361.
Barthol *vs.* Walton *et al.*, 92 Fed., 13.

Fraud in alleged preferences:
Coder *vs.* Arts, 213 U. S., 223, 241-245.

Effect of compromise under Local Law:
Secs. 1717 and 1718 (page 1146) and sec. 1232 (page 1045), Revised Statutes and Code of Porto Rico of 1902.

GEORGE H. LAMAR,
Of Counsel for Munsuri.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 22.

TEFT, WELLER & CO., A. & S. HENRY & CO., S. E. HEYMANN & CO., SHERMAN & SONS CO., BERNHEIMER & WALTER GARNER & CO., SWEETSER, PEMBROOK & CO., EVERETT, HEANEY & CO., GRINNELL, WILLIS & CO., SCHILL, SEEBOKEN & CO., AND AMERICAN TRADING CO., APPELLANTS,

vs.

SUCESORES DE JOSÉ HERNAIZ AND JULIAN MUNSURI, APPELLEES.

BRIEF FOR APPELLEE MUNSURI.

This case is presented on an attempted appeal from the United States District Court for Porto Rico by a *part* of the creditors of the firm of Sucesores of José Hernaiz, Limited, in liquidation, bankrupt, from a decree of the court in bank-

ruptcy, entered February 9, 1909 (R., 34), disallowing the claim of appellants, as named in caption except that the decree was against "Sherman, Reid & Co. (Sherman & Sons Co.)," instead of "Sherman & Sons Co." as in caption. The case is also presented upon a motion to dismiss for want of jurisdiction of this court, made on behalf of appellant Munsuri, and presented with briefs on both sides on May 17, 1909, the consideration of which was thereafter postponed until the hearing on the merits, said motion bringing in question the jurisdiction of this court to entertain an appeal from an interlocutory decree in bankruptcy disallowing a claim.

The petition for appeal (R., 34), the assignments of error (R., 35), the allowance of the appeal (R., 35-36) and the citation (R., 38-39) and appeal bond (R., 36)—all described the appellants in the same manner in which their names appear in the caption of this brief; and nowhere in the record does there affirmatively appear the individual names of the persons composing the appellant co-partnerships. Sherman, Reid & Co., against whom the decree was entered together with the other appellants, did not join in the appeal and there was no summons in severance.. The bond is executed by a member of this bar individually, although his name is recited in the bond as attorney for appellants. As the beneficiary in the supersedeas bond is named the clerk of the court below, "or his successors in office for the benefit of whom it may concern." Neither the trustee nor any of the creditors benefited by the decree of the court below, except appellee Munsuri, are made parties defendant, although it affirmatively appears that Heller and Long have an uncontested claim for $1,293.65.

The bankruptcy proceedings in which this appeal has arisen were begun on September 26, 1906, when a voluntary petition (R., 1) was filed, entitled, "Successores de

José Hernaiz, in liquidation, bankrupts." It was addressed to the court, the material portions reading as follows:

> "The petition of successores de José Hernaiz, merchants, in liquidation, composed of José Truebas Munsuris, general partner, and Julian Munsuris y Hernaiz, *limited* partner, of the city of San Juan in the Island of Porto Rico.
>
> "Respectfully represents that they have had their principal place or business for the greater portion of six months next immediately preceding the filing of this petition at San Juan, Porto Rico, within said judicial district; that they owe debts that they are unable to pay in full; that they are willing to surrender all their property for the benefit of their creditors, except such as is exempt by law, and desire to obtain the benefit of the acts of Congress relating to bankruptcy.
>
> "That the schedule hereto annexed, marked 'A,' and verified by your *petitioner's* oath contains a full and true statement of all of the debts *of said firm.* * * *
>
> "That the schedule hereto annexed marked 'B,' and verified by your *petitioner's* oath, contains an accurate inventory *of all their property,* both real and personal. * * *
>
> "Wherefore, your petitioners pray that they be adjudged by the court to be bankrupt within the purview of said acts.
>
> "SUCS. DE JOSÉ HERNAIZ EN LD.,
> "JOSÉ TRUEBA, *Petitioners.*"

This petition was verified by José Trueba.

There was no averment of insolvency on the part of either the general or the limited partner, and no schedule of assets or liabilities of the managing partner, submitting the petition, was filed or required; no averment was made nor evidence furnished of consent by Julian Munsuri to the administration under section 5*h* of the bankruptcy law; nor was there any process or notice issued against him under general order VIII.

On the day of the filing, an order of adjudication (R., 2) was passed, reading as follows:

> "At San Juan, Porto Rico, in said district court on the 26th day of September, 1906, before the Honorable Bernard S. Rodey, judge of said court in bankruptcy, the voluntary petition of sucesores de José Hernaiz, in liquidation, that they be adjudged bankrupts, within the true intent and meaning of the acts of Congress relating to bankruptcy, having been heard and duly considered, the said sucesores de José Hernaiz, *in liquidation,* are hereby declared and adjudged to be bankrupts accordingly."

The court then proceeds in the order to restrain Maurer, one of the creditors, from taking execution on a judgment obtained against the firm within four months.

On the same day another order was issued by the court referring the matter to the referee, in which it was directed

> "That said *suces. de Hernaiz, in liquidation,* shall attend the aforesaid referee on the 12th day of October, at San Juan, and thenceforth shall submit to such orders as may be made by said referee or by this court relating to said *voluntary bankruptcy.* * * * Further * * * that notice to creditors be published."

Next appears a list of claims certified to the clerk by the referee October 12, 1907, as having been filed since January 2, 1907, which shows that Julian Munsuri, the appellants and Heller and Long had all filed claims against the bankrupt firm, the claim of Heller and Long being for $1,293.65 and that of Munsuri for $11,719.00 (R., 3-4).

Next appears (R., 4) a motion or petition, not bearing any evidence of service and not verified under section 18c of the bankruptcy act, by Mr. Hawkins, "as attorney for various creditors herein," in which he

> "moves the court that Julian Munsuri y Hernaiz, who claims to be a special partner in the above firm

and as such having only a limited liability, be declared a full or general partner in said firm, and generally liable to the full extent of this property for the payment of the just debts of said firm. And further that said Julian Munsuri be ordered to deliver over to the * * * trustee herein, all his property not exempt by law to be administered by this bankruptcy court for the purposes of paying the debts of said firm."

This petition contained no averment of insolvency of Munsuri, made no representation as to whether or not Munsuri had consented to an administration of the affairs of the firm on the theory of a general copartnership or otherwise, and no averment whatsoever was made of any facts on which he was thus charged, by an informal *ex parte*, unverified motion, with being a general partner.

Then follows an opinion by the court, dated October 25, 1907 (R., 4-6), stating, among other things, that

"It appears that some months ago W. H. Hawkins, Esq., counsel for divers of the creditors, appeared before the referee and *requested* him to issue an order against the alleged limited partner Julian Munsuri, requiring that the latter file schedules of his individual property as a general partner in the premises, and further *requesting* the referee to issue an order of injunction against Munsuri restraining him until the further order of the court from disposing of any of his private property situated in this district, and *requesting* that a cautionary notice in that behalf be issued by the court to the proper register of property. It appears that the referee granted both of these requests; * * * that shortly thereafter the referee rescinded his action in this behalf, and annulled or attempted to annul his order of injunction, on the ground that he had no jurisdiction of said Munsuri. * * * Counsel for the creditor appeared before said referee and excepted to his action in the premises and petitioned that the matter be certified to the court for a ruling. Counsel

> further filed before the court itself a motion that, on the evidence already introduced before the referee, Munsuri be declared and be held to be a general, and not a special partner of the bankrupt firm.
>
> "On this motion and on the issues raised by the certificate of the referee, counsel has had a full hearing—*no person appearing for Munsuri* although parties who represented him before the referee were duly cited. A transcript of the evidence taken before the referee, as well as the exhibits introduced, consisting of letter books, papers, ledgers, etc., was duly submitted."

The court does not find that there were any regular proceedings before the referee in which, by petition duly verified under 18*c* of the bankruptcy law, proper averments were made and testimony taken pursuant to proceedings of this kind on definite issues for the determination of the alleged fact that Julian Munsuri was a general partner; on the contrary, it is stated that the summary action taken by the referee was based upon *requests* on behalf of creditors. No such pleadings appear in the record made up under general order XXXVI, and it is assumed that no one will contend that any such pleadings were ever filed. The orders of the referee do not appear in the record, neither are the pleadings on which he found that he had no jurisdiction or his report to the court, stating the manner in which the questions arose. The motion of counsel referred to by the court, and quoted above, is in the record (R., 4), but it does not incorporate the idea, as expressed by the court, that the matter be considered by him, *"on the evidence already introduced."*

The court does state, however, that he considered the evidence, "as well as the exhibits introduced, *consisting of letter books, papers, ledgers,"* etc., but the court does not state whether these records of a Spanish firm were translated into the English language, as required by the Foraker Act (secs. 34 and 35, 31 Stats., 77, 84, 85).

The conclusion of the court from this *ex parte* hearing was:

First. That from the evidence submitted to him in respect to the activities and relationship of Julian Munsuri to the firm he became, in contemplation of the laws of Porto Rico, a general partner with full responsibility as such.

Second. That the court "has full and complete jurisdiction of said Julian Munsuri under the bankruptcy act, because the general partner filed the petition as and of the 'sucesores de José Hernaiz, merchants in liquidation,' composed of José Trueba Munsuri, general partner, and Julian Munsuri y Hernaiz, limited partner, and because the said Julian Munsuri y Hernaiz thereafter, through one Wenceslao Bosch thereunto duly empowered in writing to represent him, *filed proof before the referee of a claim in his own favor against said bankrupt concern.* * * * Sec. 5c of the bankruptcy act, in our opinion, gives the court this jurisdiction." (Italics supplied.)

Accordingly, on the same day of the opinion the court entered orders declaring Munsuri a general partner, rescinding the orders of the referee vacating his orders of injunction and sequestation, and enjoining Munsuri and his agents from encumbering or selling his individual property and requiring any agent in possession of such individual property to deliver the same over forthwith to the hands of the trustee (R., 7).

In the concluding paragraph of said opinion of the court (R., 6) reference was made to prior bankruptcy proceedings and to the fact—

> "that for some reason all of the petitioning creditors came into court and consented for the proceedings to be dismissed," the court adding, "we have no knowledge of why this was done, nor as to what effect the same may have on the rights, if any, of such creditors before the present referee, and as to this we express no opinion at this present time."

On July 29, 1908, Mr. Willis Sweet, "appearing specially for the purpose * * * and for no other purpose," filed a petition (R., 7-20) on behalf of Julian Munsuri before the referees in bankruptcy, exhibiting evidences of assignment or settlement in his favor individually of the claims of all of the appellants in this cause in the year 1903, and craving a reconsideration, vacation and setting aside, by the referee, of the allowances of the claims of all of the appellants, and each of them.

This petition was verified by the affidavit of Mr. Sweet, in which he stated that he had drawn the petition and knew the contents "and believed the same to be true."

Petition set up that Julian Munsuri, "claims to have been a special partner of said firm"; that the court had held him to be a general partner, subject to all the debts and liabilities of the bankrupt firm in his opinion of July 14, 1908 (which opinion does not appear in the record in this case as presented); that, "always regarding himself a special or limited partner of said firm," when the firm became embarrassed he borrowed the sum of $40,000.00 and loaned the same to it, with the belief that said amount would be sufficient to carry the firm through its temporary embarrassment and enable it to save itself altogether; but that notwithstanding this advance, secured by his individual property, bankruptcy proceedings were begun by appellants on June 13, 1903, he being a limited partner and the value of the assets being a matter of judgment or opinion; that he decided to make, if possible, a settlement of the indebtedness of the firm, "out of his private estate, applying as far as they would go the firm assets in returning to him the funds advanced for the purpose of said settlement," with the result that he did—

> "settle and adjust the same, including all creditors, except the small claims of Edward Maurer and Heller and Long, both claims amounting in all to the sum of $5,366.37;
> * * * * * * *

> and thereupon, in the year 1904, your petitioner having settled all claims against the bankrupt estate (except the two aforesaid), departed for the kingdom of Spain, of which kingdom he is a native and subject, and has since resided therein, at the same time leaving at his departure"

certain individual property in Porto Rico, being "a limited partner," and "as he supposed and intended subject to the laws and responsibilities of a *special partnership* under the Commercial Code of Porto Rico."

The petitioner further states that after his departure said Maurer began an action in the District Court of Porto Rico and that litigation was continued for a long period of time, and various attachments were issued, "the said litigation being so annoying to the general partner of said firm of succesores of José Hernaiz & Company, that he, the said general partner (José Truebas), asked the consent of your petitioner to file a voluntary petition in bankruptcy, thus ending said litigation, with its train of expense and constant anoyance; and your petitioner consented thereto, because said Maurer and said Heller and Long had refused to make any compromise with your petitioner, and your petitioner believes that said proceeding in bankruptcy would be the best and most desirable manner of ending vexatious litigation and definitely closing out the affairs of the said bankrupt firm, including the indebtedness to your petitioner; that the managing partner of said firm, filed the voluntary pleadings and Mr. Bosch, a Spanish lawyer, presented to the referee the claim of petitioner, and Wm. H. Hawkins—

> "appeared as the attorney for Heller & Long and presented their claim for $1,293.00. A trustee was appointed, and then Mr. Hawkins, always having his appearance specified as being for Heller & Long, proceeded with a long examination of said Trueba and other witnesses. Little attention was paid to said examination, and from the record of the claim there is nothing to indicate that a cancellation of the set-

> tlement theretofore made by Julian Munsuri with various persons was ever in contemplation; but on the contrary, there was nothing to indicate what afterwards appears to have been all the time the purpose of counsel for Heller and Long, to wit, to again make claim for all of the debts settled by Munsuri as hereinbefore set forth."

And thereupon the claims of appellants were, "filed with referee October 10, 1907, and filed by referee with clerk October 12, 1907," the same having been settled by Munsuri in 1903 and by him transferred to the firm.

The petition further states that:

> "Thereupon, immediately following said examination, the said attorney for Heller and Long presented said claim above recited, *and without service upon Julian Munsuri,* personal or substitute, or at all, said Hawkins asked for an injunction prohibiting the said Munsuri, who is in Spain, or his agents, from disposing of his property, and requiring his said agent to pay all rents received from said property to the referee (trustee) in bankruptcy, which order of injunction, sequestration and seizure of property was granted by said referee, *without any notice of any kind to said Julian Munsuri* aforesaid, although all said rents and property were the private rents and property of said Julian Munsuri."

The petition then sets up that upon hearing of this he employed American counsel, who presents the petition and being advised by them that in their opinion the referee was without jurisdiction to make orders touching his individual property, a motion was presented to the referee to vacate the orders, which motion was granted; but that thereafter, on motion of said attorney, the matter was certified by the referee to the court and an order was passed by the court reinstating all said orders—

> "and thereafter, *as soon as the authority of said Julian Munsuri could be obtained so to do,* counsel in his behalf appeared * * * and the said court granted

> a hearing upon a motion made by *special appearance* to vacate the order of said court affirming jurisdiction over the person or private property of Julian Munsuri; and the said District Court did on the 14th day of July, 1908, hand down its opinion aforesaid, affirming its jurisdiction in the premises over the said private property of said Munsuri."

That the court did not pass on the claims of appellant, but indicated orally the desire of the court that this matter should come up on findings of the referee.

The petition further states that of the thirty creditors of the firm in the bankruptcy proceedings of 1903 the said Julian Munsuri settled with all of said creditors here represented except Heller and Long, and he exhibited to the petition the complete list of creditors, as shown in the bankruptcy proceedings of 1903; that of the thirty of said list of creditors represented, but eleven have presented claims to the referee, and as to the said eleven alleged creditors, with the exception of said Heller and Long, petitioner exhibited their receipts,

> "showing that their respective claims were in December, 1902, settled in full, and the *record of said settlement was filed in the United States District Court* for Porto Rico in said bankruptcy proceedings on the 7th of December, 1903, the said list of creditors, with note of said assignments being hereto attached, and marked Petitioners' Exhibit "B." * * * *that said settlement has remained in the files of said court since the time stated,* as appears from the record in said court, and that the same was in the files of said court on the 28th day of March, 1904, at which time said action was * * * duly dismissed, the said order dismissing said cause being hereto attached marked Petitioners' Exhibit "D;" * * * that since said settlement, no action has been brought, nor is any action now pending, to cancel, vacate, or set aside the said receipts, and your petitioner avers that the same appear to be in full force and effect; * * * that said settlement was

made by duly authorized parties representing all concerned, and in absolute good faith, and that all records and facts now presented to this referee were in existence at the time said settlement was had, and were accessible to all parties interested, and that nothing has occurred or developed since said settlement, or any fact discovered which was not in possession of or available to all of the parties interested at the time said settlement was effected."

The body of the petition then concluded with the averment that "said claims remained adjudicated under the action of dismissal by said court, and that all claims receipted have been and are finally settled, and that said order of dismissal was the final legal adjudication of the same; and that especially is this true *in the absence of any charge of fraud, deceit, or cheating by which said settlement was carried into effect.* * * * Your petitioner respectfully submits that the parties now seeking to avoid said settlement are too late in attempting the same and that your petitioner is advised and believes that he may invoke principles of laches to stop further annoyance, expense, and litigation with reference to said accounts, as well as the formal settlement of said claim."

On October 15, 1908, the referee submitted his report (R., 20-29), purporting to consist of "findings of fact" and "conclusions of law;" but actually consisting of certain findings of fact, but principally the result of his examination of a *part* of the books of the firm and his deductions from an application to the book entries upon the general partnership theory first advanced by the court at an *ex parte* hearing long after every entry on the books had been made, while the bookkeeper was keeping the same and Julian Munsuri was proceeding on the theory and actually believed himself to be a limited copartner.

Among the findings of fact, however, appear the following:

"The firm of Sucesores José Hernaiz was formed on May 13, 1895, with Julian Munsuri as *a special partner* and José Trueba and Isadore Llona as general partners. Llona withdrew in 1897, and the firm continued with Trueba as the *only general partner* and with Munsuri as *a special partner* down until 1904. Munsuri has prior to 1895 been a general partner in a firm having the same name, Succesores de José Hernaiz, and Trueba, his nephew, had been a clerk in that firm" (R., 20).

"On the 17th of June, 1902, due to the difficulty of collecting their accounts and to their lack of funds as recited in the testimony and in the deed of loans, Munsuri loaned to the firm $40,000.00 payable on demand.

* * * * * * *

"On March 7, 1903, * * * the three rental stores in San Juan owned by the firm * * * were transferred to Munsuri at a total valuation of $23.180.14" (R., 22).

"On April 1, 1903, Succesores de José Hernaiz filed a petition in suspension of payment in the San Juan District Court, to which they attached as required by law, an inventory of their assets and liabilities and a proposition of settlement to the creditors of fifty per cent and the other fifty per cent in four years in annual installments without interest and without security. Noties of this proceeding and of the proposition for payment of the creditors were sent to all the creditors. June 4 was appointed as the day for the meeting of creditors but no meeting was held because the bankruptcy proceedings were commenced in the Federal court, thus suspending the proceeding in suspension of payment under the local law * * *" (R., 22-23).

"According to this inventory, the assets were $117,481.94 and the liabilities $87,576.15" (R., 24).

"On June 8, 1903, an involuntary petition in bankruptcy was filed in the United States District Court for Porto Rico by several of the creditors; on June 15, 1903, a motion was filed on behalf of the bankrupt to dismiss the petition and quash the service

of summons, but nothing was done during the summer months while the judge was absent on his vacation, and on October 31, the motion to quash was overruled and the firm required to answer the petition; on November 11, Munsuri filed an answer *denying his liability as a general partner,* and Trueba filed an answer denying the acts of bankruptcy complained of in the petition and denying insolvency; on November 23, the case was set down for hearing for December 2, on the issues thus raised, but on December 2, the day for the hearing, the petitioning creditors moved to dismiss the petition, and on December 3, an order was entered requiring the *bankrupts* to file a list of their creditors in order that notices of the motion to dismiss might be sent them. During the pendency of these proceedings, since June 8, 1903, Munsuri had negotiated with the creditors and had procured an assignment from them of their credits, and on December 7, 1903, Munsuri filed in the bankruptcy proceedings his consent to the dismissal of the said petition as a creditor in his own right to the extent of $16,819.86 and as owner by assignment of the credits of nearly all the rest of the creditors. Notices of the motion to dismiss the petition were sent to all of the creditors, and, there being no further opposition to the dismissal, the petition was dismissed March 28, 1904. There was never any adjudication in bankruptcy nor any reference, nor was the bankrupt himself ever examined or his books submitted, nor were proofs of debt ever filed. The proceedings were dismissed before they ever reached that stage, and there were no considerations on the merits of the claims of the creditors. The receipts show that on June 25, 1903, A. & S. Henry & Company and Schill, Seebohm and Company, assigned their claims to Munsuri, no consideration being stated. On July 1, 1903, the American Trading Company assigned its claim to Munsuri, and on November 3, 1903, all of the New York creditors except Bernheimer and Walter and Grinnell, Willis and Company gave receipts in full running in the name of Succesores de José Hernaiz; Bernheimer & Walter later assigned their claim December 2, 1903, to Munsuri and Grinnell, Willis & Company, following with an assignment to Munsuri on February 26, 1904."

The conclusions of law of the referee consist of a brief and argument on the part of the referee, from which he reaches the conclusion of law (R., 29) adverse to the validity of the settlements, and therefore denied the motion to disallow the claims.

To this action on the part of the referee counsel for Munsuri submitted a petition for review (R., 30-31), setting up that "the main ground for the decision is that there was fraud in the negotiations with the creditors for the purchase of said claims," denying that fraud existed or was shown, and averring "*that there is no charge of fraud in the record,* and no evidence whatever of fraud in connection with the transaction," and the petition concludes with specifications of error, including the finding by the referee of fraud, without an issue being raised or proof being given to sustain the same, in not upholding the assignments as a bar to claims of appellants, and in not treating the decision of the district court as an adjudication, and in disregarding the plea of laches.

The case being presented to the court and having been argued, an opinion (R., 32-34) was delivered on January 29, 1909, on which the decree appealed from in this case was based, and which, by reference in the said decree and "findings of fact and conclusions of law by the court" (R., 32), is made a part of the same in the case as presented.

In this opinion the court said:

> "It appears that nearly three years ago (see bankruptcy suit No. 11) several of these creditors filed a petition in involuntary bankruptcy against Sucesores de José Hernaiz, and after considerable pleading was done, but without any adjudication or otherwise, notice was sent to all the creditors, and the cause was dismissed by the parties who instituted it.
>
> "* * * Some time since on the motion of a creditor who did not agree to the former bankruptcy proceedings, we held the partner Julian Munsuri to be a general instead of a special partner. * * * Now the creditors who settled with him in former bankruptcy proceedings and dismissed the proceed-

ings are coming in, notwithstanding their settlements, and wanting to collect the balance of their claims. Both the referee and their counsel have made a most painstaking search of the books of the concern, *and on the theory that because the court has held that Munsuri was a general instead of a limited partner* and because *they say* fraud was committed in obtaining the settlement, the action of the referee should be sustained.

"We cannot agree to this. *None of the former creditors were diligent,* and no one but one or two firms were diligent. At this late day it is not easy to tell what the considerations for making that settlement and dismissing the former bankruptcy proceeding were. All the creditors were represented by counsel. Those counsel could just as well have known at that time that Munsuri was guilty of acts that would make him a general instead of a limited partner, yet they did nothing in that regard. There is no evidence of any sufficient fraud in the bringing about of that settlement. *Munsuri has not had his day in court on it,* neither have these creditors testified in the case. *All the evidence of fraud is made up by the referee and counsel for creditors.* It is no light matter to go now and take this man Munsuri's private property for the benefit of a lot of creditors *who settled with him with their eyes open nearly three years ago,* and when *every fact that has since been brought out was staring them in the face at that time.*

"Counsel for the creditors as well as the referee simply make a labored effort with a lot of bookkeeping to show fraud. In our opinion above referred to in the files, it will be seen that when we rendered the same we gave no intimation that we would feel ourselves bound to permit these creditors, *who settled in the way stated,* to come in and prove their claims, but specifically stated that we expressed no opinion as to that. *We have looked over the settlements made and examined this question from end to end and our conscience will not permit us on the whole case to permit these creditors to come in now without any real showing by themselves of being misled, deceived or defrauded* other than is made by the referee

and their attorneys *from the books of the bankrupt concern. No man has to defend until he is properly attacked, and all these entries in the books might be explained were Munsuri here to do so.*

"The diligent only are favored in law. The approval of these accounts for which receipts and assignments were held by Munsuri and introduced, and on which these few particular creditors got the money three years ago *at a time when Munsuri believed himself to be a limited partner* and did not know that the law made him liable as a general partner, would in our opinion be wrong and would give them *an undue advantage.*

"Therefore, the approval by the referee of all those previously settled claims is reversed and set aside, and only the accounts of creditors who did not so settle their claims, will be permitted to be allowed, and an order to that effect will be entered."

The caption of this opinion reads as follows:

"Memorandum by the court placed in the files, *giving its reasons for overruling the referee's approval of certain claims.*"

"*The Findings of Fact and Conclusions of Law by the Court,*" reads as follows:

"In connection with the opinion rendered in the above entitled cause on January 29, 109, *in which the court gives its reasons why the report of the referee of October 15, 1908,* on the question of the reconsideration and disallowance of the claims of various creditors will be overruled and an order to that effect entered, and in pursuance of General Order in bankruptcy No. 36, P. 3, providing that a statement of the Findings of Fact and Conclusions of Law be made and filed by the court, the court does not quarrel with the Finding of Fact made by the referee and adopts the same, but reverses and sets aside the referee's conclusions of law and concludes as a matter of law:

"First. That there was not sufficient evidence to

warrant the finding of fraud by Munsuri in obtaining said receipts from the creditors.

"Second. That there was no fraud in obtaining the receipts, said receipts show a settlement that is binding on the creditors and cannot now be set aside.

"Third. That as said receipts show a binding settlement, the creditors cannot now put in a claim for the balance, and their claims must, therefore, be disallowed.

"Fourth. That the creditors now trying to set aside the settlement and compromise are only a minority of all the creditors, and have *been guilty of inexcusable laches* as shown in our opinion in the files."

On February 19, 1909 (R., 34), a decree was entered accordingly, disallowing the claim of appellants, which decree referred specifically to said opinion of the court of January 29, 1909, for the court's "reasons why the report of the referee * * * would be overruled and the claim thereby allowed would be disallowed."

The defective proceedings on appeal, more specifically referred to in the opening paragraph of this brief, were taken and the case is thus presented for disposition by this court.

ARGUMENT.

(I.)

JURISDICTION OF THIS COURT.

At the threshold of the argument we are confronted with certain propositions bearing upon the jurisdiction of this court, on which it is contended that the appeal should be dismissed:

The decree (R., 34) appealed from disallows the claim of Sherman Reid & Company, as well as those of appellants, notwithstanding which Sherman Reid & Company have not joined in the appeal (R., 62) and there has been no summons in severance.

(II.)

Firm Names Insufficient.

The partnership appellants are designated solely by their firm name in the proceedings on appeal (R., 34-40).

Deneale *vs.* Archer, 8th Peters, 526.
Heirs of Wilson *vs.* Life and Fire Ins. Co., 12th Peters, 140.
Davenport *vs.* Fletcher, 16th How., 142.
Musling *vs.* Cenazos, 6th Wallace, 355, 361, 362.
Miller *vs.* McKenzie, 10th Wallace, 582.
The Protector, 11th Wallace, 82.
Estis *vs.* Tarbue, 128 U. S., 225, 228.

In the last-mentioned case this court says:

> "As before stated the writ of error is taken out in the name of Estis, Doan & Co., as plaintiffs in error,

against Trabue, Davis & Co., as defendants in error, without naming in the writ of error the individuals who compose either of the firms.

"It is well settled that this court cannot take jurisdiction of a writ of error which describes the parties by the name of a firm, or which designates some of the parties by the expression '& Co.,' or the expression 'and others,' or in any other way than by their individual names."

In the case at bar the whole theory of the appellants is that the firm of Sucesores de José Hernaiz, as an alleged general copartnership, composed of Julian Munsuri and José Truebas, is liable to the payment of their claims; yet Truebas is not named as one of the appellees, and no citation was had against him.

The defect in the proceedings on appeal in respect to naming partnership appellants by their firm names in these appellate proceedings is fatal, in view of the fact that the names of the individuals who composed each of the copartnerships nowhere appear in the record, and this defect cannot be now cured.

(III.)

Neither Heller and Long nor the trustee in bankruptcy were joined as appellees.

It appears from the record (p. 3) that, with the exception of the individual claims of Julian Munsuri and Heller & Long, all of the other claims filed against the firm were disallowed by the decree from which this appeal is taken; and, therefore, so far as the assets arising from the firm itself is concerned, Heller & Long, with an allowed claim of $1,293.65 (R., 3), is directly interested in having sustained the decree disallowing the claims of appellant and Sherman, Reid & Co.; yet neither Heller & Long nor the trustee in bankruptcy are joined as appellees. It will be observed in this connection that the claims of appellants and

Sherman, Reid & Co. were all assigned by Julian Munsuri to the firm, so that, as far as Heller & Long are concerned as creditors of the firm as a separate legal entity, a disallowance of the claims of appellants must operate directly in his favor; yet he is not cited here and given an opportunity to defend his interests before this court, and the trustee is not here to conserve the assets of the firm in this cause, for the same reason.

(IV.)

Appeal Bond Defective.

(*a*) The supersedeas appeal bond (R., 36) runs in favor of the clerk of the court below and not in the names of the parties to the judgment, or any of them.

> "A bond on appeal must be given to a party to the judgments."
>
> Davenport *vs.* Fletcher, 16th How., 142.

(*b*) The bond is executed by Wm. H. Hawkins, a member of the bar of the court below, individually, although his name is recited in the bond as attorney for appellants.

Questions Raised by Motions to Dismiss.

(*a*) This court has no jurisdiction to entertain an appeal from an interlocutory order of the court below, disallowing claims in bankruptcy proceedings.

(*b*) If so, under 25*a* of bankruptcy act, it must be by analogy to the proceedings from district courts in organized circuits to the Court of Appeals of such circuit, and in accordance with section 25*a* 3, and this appeal should be dismissed because not "taken within the ten days after the judgment."

(c) There is no authority of law for any appeal to be taken from the District Court of Porto Rico from an interlocutory decree.

In the consideration of these three grounds for dismissal, as incorporated in the motion of appellee Munsuri to dismiss, now pending for determination before the court, attention is called to the brief of counsel for said appellee in support of the motion and also their brief in reply to that of counsel for appellants, as filed during the October term, 1908, of this court, quotations from the pertinent provisions of the statute being therein made and discussed.

The bankruptcy act was passed before the organization of the court below, but this court undoubtedly has jurisdiction of appeals from *final* decrees in bankruptcy, under the provisions of section 24*a* of the bankruptcy law, as the court below is "not within any organized circuit of the United States."

The only provision of law under which this court is given specific jurisdiction by appeal or writ of error to review the decrees and judgments of the United States Court for the District of Porto Rico is contained in the act of Congress of April 12, 1900, commonly known as the Foraker Act (31st Stats., 77, 85), which act *was passed two years subsequent to the bankruptcy law* of July 1, 1898, and provides, in section 35:

> "that writs of error and appeals from the *final* decisions of the Supreme Court of Porto Rico and of the district courts of the United States shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations and in the same cases as from the Supreme Courts of the Territories of the United States."

The manner of procedure on appeals from the Supreme Courts of the Territories is set forth in the act of April 7, 1874, chapter 80, section 2, and quoted pages 14 and 15 of brief in support of motion to dismiss in this cause.

The manner of procedure in prosecuting this appeal was not that referred to in this act; but the order of the court below (R., 34) as well as the "findings of fact and conclusions of law by the court" (R., 32) specifically refer to the general order in bankruptcy No. 36, page 3, which shows conclusively that the appeal was intended to be taken as an appeal in bankruptcy.

It is not claimed to be intended as a petition, "to superintend and revise" under 24*b* of the bankruptcy law, even by analogy; but it is contended by opposing counsel that sections 24*a* and 25*a* should be read together and that, inasmuch as there is no Circuit Court of Appeals to which an appeal could be prosecuted from the disallowance of a claim, this court should so construe the general provision of section 24*a* as to permit the presentation of an appeal from an order disallowing claims, as is specifically authorized by section 25*a* 3 to Circuit Courts of Appeals from such decrees of district courts within their several jurisdictions, and in support of this contention they refer to the language used by Chief Justice Fuller in the case of Armstrong *vs.* Ferdinandez, 208 United States, 324, 330, the decision in which case is discussed by counsel for appellee in a reply brief to the brief of counsel on motion to dismiss.

As shown by quotation in said former reply brief of counsel for appellee from the brief of counsel for appellant in the Armstrong case, jurisdiction was claimed under "section 24 of said bankruptcy act and section 35 of the Civil Government Act of Porto Rico (31 Stats. at Large, 85)." The opinion of Chief Justice Fuller, quoted from by opposing counsel in this Armstrong case, says:

> "This is an appeal from a court of bankruptcy, 'not within any organized circuit of the United States' from a judgment adjudging Pascasio Alvarado, a bankrupt under section 24*a* and section 25*a* of the bankruptcy act, general order XXXVI, 3."

It is immaterial to the consideration of the case at bar whether this court in the Armstrong case intended to refer to section 25*a* or to section 35 of the Foraker Act on which counsel for appellants relied, as the order adjudging Pascasio Alvarado a bankrupt, as an adjudication in bankruptcy might well be construed by this court as a *final decision* within the meaning of the Foraker Act.

In this connection attention is called to the decision of this court in the case of Plymouth Cordage Co. *vs.* Smith, 194 U. S., 315, and to the cases therein cited and in which this court said:

> "We think the law should be taken as it is written, and perceive no adequate reason for concluding that the real intention of Congress is not expressed in the language used."

On the subject of appeals from interlocutory decrees disallowing claims in a bankruptcy court, the only "language used" is contained in sections 25*a* and 25*b* of the bankruptcy act, the former granting rights of appeal from district courts to *Circuit Courts of Appeal* and the Supreme Courts of the *Territories,* and section 25*b* allows appeals to this court.

> "From any *final decision of a Court of Appeals,* allowing or rejecting a claim under this act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases, *and no other:*
>
> "1. Where the amount in controversy *exceeds the sum of $2,000.00,* and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States.
>
> "2. Where some justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essen-

> tial to a uniform construction of this act throughout the United States."

It is not claimed that any justice of this court has made a certification under said paragraph 2 of 25*b* of the act, and that section clearly does not apply.

By reference to the list of claims as reported by the referee October 12, 1907, found on page 3 of the record, it will be seen that with the exception of the claim of Teft, Weller & Company each and every one of the claims of the other appellants are less than *$2,000;* yet the bankruptcy law expressly provides that the amount involved must exceed $2,000.

If section 25 is to be made to apply to appeals from the court below, we submit that the limitation in amount to $2,000 should also apply, and that the words "*no other*" constitute a limitation on this court in the premises.

If a joint decree, there should have been summons in severance against Sherman, Reid & Co. If not, then the lack of jurisdictional amount involved affects all except appellants Tefft, Weller & Co.

And the case can, therefore, not be entertained as an appeal in bankruptcy, the proceeding by which the jurisdiction of this court was manifestly sought.

Jurisdiction Under the Foraker Act,

But opposing counsel contend that this appeal may be entertained as a final decree under the Foraker act, saying:

> "This controversy arises out of an application to subject the individual property of Munsuri, *not brought in by the petition in bankruptcy,* to the satisfaction of creditors, and this right after being once granted is then denied on the intervening petition of Munsuri. In such a case there is clearly involved a separable controversy, and the judgment is clearly

final. An affirmance here would require nothing to be done by the court below."

Page 10, brief of counsel for appellants in opposition to dismiss.

The facts are that the appellants sold merchandise to the firm. The firm was adjudged a bankrupt. Appellants came into the bankruptcy proceeding and the referee listed their claims on formal *ex parte* proofs of claim. Subsequently Julian Munsuri, claiming to be a limited partner and also a creditor of the firm, appeared specially for the purpose and asserted, in the interest of the firm and the other creditors, that the claims of appellant had been settled by him in 1903, when he took equitable or legal assignments and that the same had subsequently been reassigned by him to the firm and that, thus, the firm was not indebted as alleged, exhibiting the evidences of settlement, and averring that it was an error on the part of the referee to have allowed the claims.

No answer or cross-petition was filed by the appellants, and no definite issues were presented by which the evidences of settlement were to be controverted by the appellants in substantiating their claims against the firm. The decision of the court below indicates the course pursued by the referee.

The referee refused to reconsider and disallow the claims of appellants, which technically speaking are against the firm.

The disallowance of these claims by the court, under the circumstances, presents no such ground for the claim of finality as is craved. The controversy as to the jurisdiction of the court over the private property of Munsuri is involved in case No. 21 of this term, wherein Munsuri is appellant or petitioner, and the trustee in bankruptcy is the respondent. The decree is clearly interlocutory.

But this is not the only difficulty appellants have in obtaining jurisdiction in this court under the Foraker Act, as

the claims of each of the appellants except one are for amounts less than the jurisdictional amount of $5,000.

We submit that these appeals should be dismissed for lack of jurisdiction on the part of this court.

II.

Decree Below Should be Affirmed.

As pointed out in the opinion of the court below (R., 32-34), "giving its reasons for overruling the referee's approval of the claim" and embodied by reference in the decree and findings of fact and conclusions of law, the findings of fact by the referee were based upon insufficient evidence to support his conclusions of law. Indeed those findings consist more of a delineation of figures and deductions from a remnant of the books of the firm, presumably in the Spanish language, than they do of definite conclusions of fact contemplated as the character of findings of fact to be made under general order No. 36 in bankruptcy cases or the findings required by the proviso to section 2 of chapter 80 of the acts of Congress of 1874, embodied by reference for procedure in section 35 of the Foraker Act (*supra*).

"A so-called statement of facts which merely sets out the evidence is not such a statement as is required by this act" of April 7, 1874, chapter 80.

Cohn *vs.* Daley, 174 U. S., 539.

In such a case where there is no finding of facts, this court will assume that the judgment of the district court was justified by the evidence.

Cohn *vs.* Daley (*supra*).
Marshal *vs.* Burtis, 172 U. S., 630.
Burnifield *vs.* Price, 154 U. S., 672.

As indicated by the court below, the delineations and deductions contained in the so-called findings of fact were based

upon the hypothesis that Julian Munsuri was a general partner and not a limited partner of the firm; yet the court, who entered the decree declaring him to have been in contemplation of law a general partner, stated in his said opinion that Julian Munsuri, at the time of the transaction, *believed himself to have l[illegible] a pimited partner.* And hence fraudulent intent could not be imputed to him or the books of account and business transactions be expected to comport with a theory diametrically opposite to that on which he was proceeding in good faith.

As suggested in another branch of this argument, the first paragraph of the findings of fact finds that he was a limited partner, according to the notarial articles of copartnership. No issues were framed upon this question of fact before the referee, and his findings of fact in this case on this phase of the subject is based, not upon the evidence, but *upon the decree of the court* finding Munsuri to have been a general partner, which *decree has not yet become final,* and a review by this court is now sought in case No. 21 of the proceedings by which that conclusion was reached.

It is submitted, therefore, that the so-called findings of fact, as presented, are defective and that this court should, in harmony with its rulings in the cases cited, assume that the decree of the district court was justified by the evidence, and affirm the same.

As stated in those decisions, this court is limited in its appellate jurisdiction to the findings of fact presented in the form of a special verdict. When the proceedings below are so defective that this court is unable to obtain the essential facts in this form, freed from mere recitations of evidence or deductions, there is nothing else it can do but to affirm the decree of the court on the theory stated.

If this court should not dismiss this case for want of jurisdiction, then it would seem to be peculiarly appropriate that the course suggested should be pursued. The proceeding on the part of appellants to establish their claim against the firm, notwithstanding the receipts or assignments given by

them three years before they undertake to assert the claim, was essentially a proceeding on the equity side of the bankruptcy court, and all of the principles applying to a complainant in a bill of equity are applicable to the assertion by appellants of their claims. The court finds, in the first place, that they made no charges to enlighten the *quasi* defendant of the grounds upon which they proposed to avoid their own written instrument. This was contrary to general order No. 37, making applicable the equity rules. He says, further, that the individuals whom the referee claims were deceived did not give ther testimony, either by deposition or otherwise. The court also says that the points to which the referee took exception to the alleged conduct of Julian Munsuri were of such a nature as that they might have been satisfactorily explained by the testimony of Munsuri himself, but that the proceedings had been so conducted that Munsuri had not "*had his day in court.*"

The court also stated that the facts and circumstances at the time of the settlement were such that all of the appellants, locally represented in Porto Rico as they were by counsel, were put on notice of the alleged facts on which the adverse report of the referee was predicated. Under such circumstances full and complete knowledge must be imputed to them.

The court states that he had spent the greater part of a month off and on in a careful investigation of the whole matter, from end to end. He had before him in this investigation the proceedings in bankruptcy of 1903, instituted by some of the appellants at least, and in respect to which all of the creditors of the firm were given notice before any action was taken. It has been carefully kept out of the record in this case, but the court below had the benefit of seeing the averments contained in the petition in bankruptcy in that case and of what steps each of the appellants took in that case. It is found by the referee that previous to that time, in April, 1903, a schedule was filed by the firm in suspension of payment proceedings in the insular court,

and that every creditor was given notice. The conveyances from the firm to Munsuri of store properties, referred to in the report of the referee, were notarial instruments of record and executed within four months of the time of the institution of bankruptcy proceedings in 1903. In the opinion of the court below the settlements made by the ten or eleven creditors who are appellants were valid, and made with actual or imputable knowledge.

The undisputed facts are that none of the thirty creditors other than those whose claims were disallowed by the decree of the court below have disputed or made claims in these bankruptcy proceedings except Heller & Long, with whom it is conceded no settlement has been made, but against whose interest it would be for these creditors to come in and participate in the distribution of the assets of the firm.

The court below suggests that it would be inequitable and an unfair advantage for these creditors, who had made settlements and co-operated in the dismissal of the bankruptcy proceedings in 1903 or 1904 and botten their money on a compromise basis, to be now permitted to come into this bankruptcy court, sitting as a court of equity, assert their claims in full and participate in the distribution of such assets as may finally be found available.

Not only is this true in equity, but, under the provisions of the local laws of Porto Rico, such a settlement, under such circumstances, as will be seen below, has "the same authority as *res judicata.*"

The first three findings of law by the court (R., 32), to the effect that there was not sufficient evidence to warrant the findings of fraud by Munsuri in obtaining the settlements with appellant creditors; that there was no fraud in obtaining the receipts showing binding settlements with said creditors, and that they cannot now assert their claims against the firm based on claims so settled, are sustained by the record, and the decree of the court below should be affirmed.

III.

Laches.

The fourth finding by the court is:

> "That the creditors now trying to set aside the settlement and compromise are only a minority of all the creditors and have been guilty of *inexcusable laches* as shown in our opinion on the files."

It needs no citation of authorities to establish the proposition that the application of the doctrine of laches depends upon the facts and circumstances of each case.

Laches may be set up by demurrer to a bill in equity where the averments justify the same and the ordinary equity procedure gives the defendant an opportunity, by demurrer, to exact from the complainant sufficient averments of fact to avoid, if proven, the application of this equitable doctrine.

In the case at bar, the appellants disregarded the equity rules of this court, made applicable by general order to equitable proceedings in bankruptcy, did not give the respondents an opportunity to have the benefit of such specific forms of averment; and the proceedings before the referee were such that there *was not even a charge* of fraud made, and no opportunity was, therefore, given to obtain pleadings, by which this court can gain a definite idea of the issues on which the matter was tried before the referee, except from the strictures of the court in respect to the character of those proceedings, as contained in his opinion.

As stated above, the court finds in his opinion, that at the time of the settlements, the appellants were put on notice of the very facts upon which the referee reaches the conclusion of law that the settlements were fraudulently made. This being true, such knowledge must be imputed to the appellants and the failure on their part to have proceeded

within a reasonable time to set aside the transaction was laches, under the American system. Under the laws of Porto Rico a compromise has the same authority as *res adjudicata*, and where accompanied by a withdrawal of the party to the compromise, from a suit already begun, he cannot set up an error of fact against another.

Civil Code of Porto Rico, secs. 1717, 1718, and 1232.

The court also refers to the fact that the delay has served to render it difficult, if not impossible, to correctly discern the pertinent facts bearing upon the transaction. The evidence is not before the court and it does not affirmatively appear what, if any of the witnesses to those transactions, have passed away between the transactions and the hearing of this case. It does appear in the second finding of the referee that there are only two books remaining of the firm from which, as stated by the court, the information of the referee was almost wholly obtained.

As a matter of fact, the referee reports that the only books of the firm remaining are those opened in the spring of 1902, and it also appears that the copartnership was in process of winding up its affairs along about this time. The report of the referee fails to find or to state any definite information in respect to the debts due the firm at the time that a dividend of about $25,000.00 was declared, and which he asserts to have been fictitious. He states in his report that these two books consisted of a journal and a ledger, but does not state the scope of the ledger—whether confined to the general partnership accounts or whether it included also the accounts between the firm and the various persons indebted to the firm.

It does appear that the assets exceeded the liabilities at the time of the suspension of payment in April, 1903. The court's conclusion, as stated in his opinion, after full opportunity on his part to examine all of the evidences in the case, that the evidence adduced was insufficient and that any con-

clusions reached by computations from the book entries were largely conjectural.

There is no finding as to when the firm became insolvent; and all of the alleged transactions to which objection was taken, and which the court finds might be satisfactorily explained by Munsuri if given an opportunity to testify, antedate the pending bankruptcy proceedings three or more years.

Upon this state of facts it would be difficult for this court, from the findings of fact of the referee alone, to say that the court below was in error in concluding that the appellants had been guilty of inexcusable laches.

WILLIS SWEET,
GEORGE H. LAMAR,
Solicitors for Julian Munsuri.

[13989]

Office Supreme Court U. S.
FILED
OCT 26 1911
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 22.

TEFFT, WELLER & COMPANY ET AL., APPELLANTS,

vs.

JULIAN MUNSURI, APPELLEE.

BRIEF FOR APPELLANTS.

WM. H. HAWKINS,
WM. G. JOHNSON,
Counsel for Appellants.

THE LAW REPORTER PRINTING COMPANY, WASHINGTON, D. C.

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Statement.

This is an appeal (Rec., pp. 34–5), from a decree of the District Court of the United States for Porto Rico, sitting as a Court of Bankruptcy (Rec., p. 34), disallowing the claims of all the appellants, which had theretofore been allowed by the referee (Rec., p. 29). Each one of the claims exceeds the sum of $500, the smallest, that of the appellants Sherman, Reid & Co., being for the sum of $542.46 (Rec., p. 3). The proceeding was begun September 26, 1906, by the voluntary petition of José Truebas Munsuri and the appellee, Julian Munsuri, composing a commercial partnership trading in the city of San Juan, Porto Rico, under the name and style of Sucesores de José Hernaiz (Rec., pp. 1–2).

Previous to this proceeding, on June 8, 1903, a petition in involuntary bankruptcy had been filed against the firm by certain creditors, which was dismissed March 28, 1904, without other proceedings therein than the

overruling of a motion to quash the summons and the filing of answers by Munsuri and Truebas (Rec., p. 23), under circumstances which will be hereafter fully stated.

While this first proceeding in bankruptcy was pending, and between June 24, 1903, and February, 1904, the appellee, Julian Munsuri, effected a settlement with all the appellants, by paying them each 25 per centum of their claims, except the appellants, Sweetser, Pembrook & Co., to whom he paid 50 per centum of their claim (Rec., pp. 11, 20, 23).

After the present proceeding was instituted these appellants, notwithstanding the settlement theretofore made, filed their claims for the balance due them, claiming the right to participate on the ground that the settlement was procured by fraud.

The claims were resisted by the bankrupts, testimony was taken, and the claims allowed by the referee on the ground that the settlement was shown to have been obtained by fraud and that the payments and receipts in full therefore constituted no bar to the appellants (Rec., p. 29).

The referee filed findings of fact from the evidence and his conclusions of law (Rec., pp. 20–29). Thereupon, the appellee, Julian Munsuri, filed a petition for review of the referee's order allowing the claims (Rec., pp. 30–31). Thereafter, on February 9. 1909, the court entered a decree overruling the action of the referee and disallowing the claims of all the appellants (Rec., p. 34). From this order the appellants prayed this appeal, filed their assignments of error, and the appeal was allowed February 15, 1909 (Rec., pp. 34–6). The citation was signed and served on February 23, 1909 (Rec., pp. 38–9), and the bond on appeal approved February 24, 1909 (Rec., pp. 36–7).

Prior to entering the order overruling the action of the referee and disallowing the claims of appellant, the court,

on January 29, 1909, filed an opinion thereon (Rec., pp. 32–4), and on February 9, 1909, contemporaneously with the order disallowing the claims, the court filed its findings of fact and conclusions of law, adopting, for the former, the findings of fact by the referee in the following language:

> "In pursuance of General Order in Bankruptcy No. 36, p. 3, providing that a statement of the findings of fact and conclusions of law be made and filed by the court, the court does not quarrel with the findings of fact made by the referee and adopts the same" (Rec., p. 32);

so that the findings of fact required by the order of this court are those of the referee, set out in full in the record (Rec., pp. 21–5).

From the foregoing résumé of the proceedings it will be seen that the question presented by the record is simply whether the findings of fact disclose such fraud practiced upon the appellants as vitiated the settlement made with them during the pendency of the previous bankruptcy proceedings and entitled them to have the balance due on their claims allowed in this proceeding.

The claim of appellants is that the bankrupts entered into a conspiracy to defraud appellants, first, by making large purchases of stock on credit, and then by harassment, concealment, and false representations to effect a settlement on their own terms.

The general scheme and more important details of that alleged fraud, as shown in the findings of fact, will now be stated.

On June 17, 1902, due to the firm's difficulty in collecting accounts and to a lack of funds to meet its debts, Julian Munsuri loaned the firm $40,000, payable on demand. At this time Munsuri was indebted to the firm in the sum of $22,752.79. No part of the loan was applied to this debt, but he was carried on the books as a

creditor of the firm for the full sum of $40,000 (Rec., p. 22). Ten days later, on June 27, 1902, fictitious profits, amounting to $25,025.62, were distributed as dividends—$15,185.90 to Julian Munsuri, and $6,822.66 to his partner, Trueba, the balance being distributed as a gift to two clerks (Rec., p. 21). The distribution of these fictitious profits on the books was then applied as a credit on account of the personal indebtedness of Munsuri and Trueba to the firm, and the capital accounts of both Munsuri and Trueba were reduced and the amounts applied to their indebtednesses to the firm in sufficient amount to cancel the same. By this distribution of fictitious profits and withdrawal of capital Munsuri's indebtedness to the firm of over $22,000 was entirely wiped out and he appeared on the books as a creditor only, in the sum of $40,000 (Rec., pp. 21–2).

In March, 1903, three of the retail stores belonging to the firm were transferred to Munsuri at $23,180.14, being less than their valuation on the books, and this amount was credited on Munsuri's loan of $40,000, so that he appeared as a creditor for $16,819.86, whereas, and in fact, he owed the firm over $22,000 (Rec., pp. 21–2).

Between June 27, 1902, the date of distribution of the fictitious profits, and February 15, 1903, the firm stocked up heavily in merchandise, the merchandise account jumping from $14,092.18 to $98,413.38, principally purchased from these appellants, the increase of merchandise thus amounting to over $84,000 (Rec., p. 25). At the time these purchases were made the firm was in no better condition than in June, 1902, when it could not pay its creditors (Rec., p.25). During this same period the sales of merchandise amounted to over $75,000, on which a gross profit of only $195.81 was realized, from which expenses for the same time would have to be deducted.

Six weeks later, on April 1, 1903, the firm filed a petition in suspension of payments in the San Juan District

Court, under the Commercial Code, to which they attached an inventory of assets and liabilities and a proposition of settlement to the creditors of 50 per cent, and the balance in four years, in annual instalments without interest and without security (Rec., p. 22). Notice of this was sent to all creditors, and a meeting of creditors set for June 4, 1903 (Rec., pp. 22–3). No meeting took place, however, as a petition in a proceeding in involuntary bankruptcy was instituted in the United States Court (Rec., p. 23).

This inventory of assets and liabilities was false, the assets being over $59,000 short and the liabilities over $16,000 in excess of the truth, the details of which are given in the seventh finding of fact (Rec., pp. 23–4).

It also appears that from the date of the dividend of fictitious profits, June 27, 1902, Munsuri continued to withdraw money and merchandise from the firm so that by June 24, 1903, he owed the firm over $7,000, and even during the pendency of the first bankruptcy proceedings he so continued, and his indebtedness by November 1, 1903, just ten days before filing his answer in the first bankruptcy case, had increased to over $15,000 (Rec., pp. 23, 24).

He was enabled to do this, because though the petition in bankruptcy was filed June 8, 1903, a motion was filed to dismiss and quash the summons June 15, 1903, but nothing was done during the summer while the judge was away on vacation (Rec., p. 23), so that he improved this opportunity to plunder the firm. It also appears that during this time, Munsuri, concealing the true facts from them (Rec., p. 24) was negotiating with the creditors to effect a settlement, the first settlement being with the English creditors on June 24, 1903. He also made false representations to the creditors to induce the settlement, represented himself as a special partner, and denied committing any act

which would make him liable as a general partner and asserted that he had lost as a creditor of the firm more heavily than any other creditor. He also used the false inventory of the liabilities and assets of the firm filed in the suspension of payments proceedings as a basis to induce the creditors to settle (Rec., pp. 23–4). As matter of fact he was a general partner, as was afterwards adjudged in this case (Rec., pp. 4–7).

By these means Munsuri obtained settlements with all the appellants, and having obtained assignments of the claims of nearly all the creditors and claiming himself to be a creditor, on December 7, 1903, he filed his consent as creditor and assignee of the other creditors to have the proceeding dismissed (Rec., p. 23). Notices were sent out and, no opposition being made, the proceedings in bankruptcy were, on March 28, 1904, dismissed (Rec., p. 23).

The above detailed facts were all brought out in the present bankruptcy proceedings and none of them were disclosed in the first one brought in June, 1903. In that proceeding—

> "there was never any adjudication in bankruptcy nor any reference nor was the bankrupt himself ever examined or his books submitted nor were proofs of debt ever filed. The proceedings were dismissed before they ever reached that stage, and there was no consideration on the merits of the claims of the creditors" (Finding 8, Rec., p. 23).

This settlement with appellants was not a composition under the Bankruptcy Act, as it was not a matter before the court; nor was it a composition among the creditors, as there was no concurrence or agreement among them, each acting independently of the others.

Nor was it a purchase of claims by a stranger. In

effecting the settlements Munsuri was acting for the firm. All of the receipts from appellants but four were drawn directly to the firm and all were subsequently transferred to the firm (Rec., pp. 14–19), while at the time of making the settlements he was a partner and used the firm assets therefor (Rec., p. 9), and during the same time he increased his own indebtedness to the firm by withdrawals of money and merchandise from $7,183.32, the day he paid the English creditors, to over $15,000 on November 1, 1903, two days before he settled with the New York creditors (Rec., p. 24). And at the time of the settlement with appellants he was himself a debtor to his firm for more than he paid in settlement.

Assignment of Errors.

1. The court erred in holding as a conclusion of law that there was not sufficient evidence of fraud in the obtaining of said receipts and assignments from the creditors.

2. The court erred in holding as a conclusion of law that the receipts and assignments showed a settlement with the said creditors of their claims that is binding on them.

3. The court erred in holding as a conclusion of law that said receipts are a bar to the creditors now putting in their claims for the balance.

4. The court erred in holding as a conclusion of law that said creditors have been guilty of inexcusable laches.

5. The court erred in entering judgment rejecting and disallowing the debts or claims of appellants.

ARGUMENT.

As appears in the record, on the motion of the creditors (Rec., p. 4), the court, after hearing, held and adjudged that the appellee, Julian Munsuri, was a general partner liable for all the debts of the firm, ordered him to file schedules of his individual property and ordered the delivery of the same to the trustee in bankruptcy (Rec., p. 7). The grounds upon which the court so held and adjudged are set forth in the opinion on that subject (Rec., pp. 4–6). From this opinion it appears that objection was made to the jurisdiction of the court so to adjudge as to the appellee. It seems proper to bring to the attention of the court certain matters bearing upon that question.

Julian Munsuri was in court as a petitioner in the proceedings. The petition begins as follows:

> "The petition of Successores de José Hernaiz, merchants in liquidation, composed of José Truebas Munsuris, general partner, and Julian Munsuris y Hernaiz, limited partner, of the city of San Juan and the Island of Porto Rico" (Rec., p. 1).

And it concludes as follows:

> "Wherefore your *petitioners* pray that *they* may be adjudged by the court to be *bankrupts* within the purview of said act" (Rec., p. 2).

Said Munsuri, on July 29, 1908, also filed a petition in the cause before the referee (Rec., pp. 8–13) and states, *inter alia*, that his general partner—

> "asked the consent of your petitioner to file a voluntary petition in bankruptcy, thus ending said litigation, with its train of expense and constant annoyances; and your petitioner consented thereto" (Rec., p. 10).

And, also:

> "Accordingly, José Trueba, the managing partner of said firm, filed a voluntary petition in bankruptcy on the 26th day of September, 1906" (Rec., p. 10).

Thus it is seen that by the petition for adjudication as a bankrupt, filed with his consent, he became a party petitioner in the proceedings, and had, as early as October 10, 1907, appeared in the case and proved his claim as a creditor (Rec., p. 3).

When, therefore, on October 25, 1907, he was adjudged a general partner (Rec., p. 7), he was, as held by this court, a party to the cause for all purposes within the scope of the proceedings and subject to its jurisdiction.

In the case of Wiswall *vs.* Campbell, 93 U. S., 344, Mr. Justice Miller, speaking of the jurisdiction in bankruptcy, says (p. 351):

> "Every person submitting himself to the jurisdiction of the court in the progress of the cause, for the purpose of having his rights in the estate determined, makes himself a party to the suit, and is bound by what is judicially determined in the legitimate course of the proceedings."

The adjudication of Munsuri's true relations to his own firm, under his own petition, seeking to be adjudged a bankrupt, was a necessary element in the proceedings. A false allegation in his petition as to those relations could not so limit the jurisdiction of the court as to prevent it from ascertaining and adjudging the truth without his subsequent consent.

There can therefore be no doubt of the jurisdiction of the court below over the appellee.

The Acceptance and Receipts for Prior Payments Not a Bar to Appellants' Claims.

As shown by the record, the court below agreed with the referee as to the probative force of the evidence and adopted, as its own, the findings of fact of the referee, but differed with the referee as to the legal consequences of those facts (Rec., p. 32). In its conclusions of law the court held the payment and receipts to be a bar to appellants, and in this, it is respectfully submitted, the court erred.

In considering this question, it is important that the exact facts connected with the payments be kept in view.

A comparison of the original claims of appellants as set out in the list of creditors (Rec., pp. 19–20), with the receipts for payment (Rec., pp. 14–19), will show that the amounts are not, and do not purport to be, the full amount of the claims, although the receipts state that the sum paid is received "in full settlement" of the claim.

The amounts paid appear to have varied somewhat. For instance, the claim of Tefft, Weller & Co., was for $14,174.27 (Rec., p. 20), and the receipt is for $3,516.45 (Rec., p. 14), a trifle under 25 per cent. Sweetser, Pembrook & Co.'s claim was for $3,401.40 (Rec., p. 20), and their receipt is for $1,700.70 (Rec., p. 15), exactly 50 per cent. In four of the cases the amount paid is not stated in the voucher, while all the others are approximately for 25 per cent of the claims.

If these payments are to be treated merely as payments by the debtor, in satisfaction of the claims, it could not be maintained that the payments, *per se*, without any other circumstances, could have that effect or be any obstacle to the ~~debtors~~ creditors' right to assert their claims for the balance entirely irrespective of any fraud

or undue advantage. As there is no claim made in this record that there was any dispute as to the validity or amount of any of the claims, or that they were not presently due and payable, or that there was any consideration for the acceptance of a part payment in lieu of the whole claim, a part payment could not extinguish the debt. This ancient rule of the law is affirmed by this court in Fire Association *vs.* Wickham, 141 U. S., 564, in which case Mr. Justice Brown says (p. 577):

> "The rule is well established that where the facts show clearly a certain sum to be due from one person to another, a release of the entire sum upon payment of a part is without consideration, and the creditor may still sue and recover the residue. If there be a *bona fide* dispute as to the amount due, such dispute may be the subject of a compromise and payment of a certain sum as a satisfaction of the entire claim; but where the larger sum is admitted to be due, or the circumstances of the case show that there was no good reason to doubt that it was due, the release of the whole upon payment of part will not be considered as a compromise, but will be treated as without consideration and void."

Indeed, it would seem from this record that appellants might well have stood upon this ground alone, without showing any fraud in the transaction, but as the whole course of conduct of the debtors is shown and the gross frauds perpetrated are abundantly established by the record, it is not necessary for them to limit their right of recovery to that rule of law.

The Payments were Payments by the Debtors.

That these payments were in reality payments by the debtors and for their benefit solely is demonstrable from this record.

The payments were made by Munsuri, who was a general partner and liable individually for the debts. During the

time of the negotiations and payments, though a proceeding in bankruptcy was actually pending, this partner was withdrawing money and merchandise from the firm, and by November 1, 1903, when payments had been made to only three of the appellants, A. S. Henry & Co., Schill, Seebohm & Co., and American Trading Co., as shown by finding six (Rec., p. 23), he had withdrawn over *eight thousand dollars*, as shown by finding eight (Rec., p. 24). The last payment was made by him February 26, 1904, as shown in the sixth finding (Rec., p. 23). By the 13th of April, 1904, only forty-five days after the last payment, he had withdrawn in all $34,973.40, *over $27,800 of which was withdrawn by him after he began making payments to appellants*, as shown by the eighth finding (Rec., p. 24), while the total amount paid by him to the appellants, and to all the other creditors of the firm *combined*, aggregated only $17,687.73, as shown by the tenth finding (Rec., p. 25). Thus, while engaged in making these payments to appellants, and within forty-five days after the last payment, he had *withdrawn from his firm over ten thousand dollars more* than the aggregate of what he had paid out to *all the creditors of the firm* combined.

In the sixth paragraph of his petition to the referee, seeking to have appellants' claim disallowed, Munsuri states what he claims was his design and purpose in making these payments, thus:

> "Your petitioner further shows that when said firm was adjudged bankrupt,* as aforesaid, in the year 1903, and it became evident that the assets of said firm would not satisfy the demands made against it, *he decided to make, if possible, a settle-*

*This statement is an error. As shown by the sixth finding, there was no adjudication in the 1903 bankruptcy proceeding, which went no further than the filing of answers by the alleged bankrupts (Rec., p. 23), which matter has been fully set forth and explained in the foregoing statement.

> *ment of said indebtedness*, out of his private estate, *applying as far as they would go the firm assets in returning to him the funds* advanced for the purpose *of said settlement*" (Rec., p. 9).

According to his own statement, therefore, he merely undertook to loan to the firm money enough to settle these debts and have the firm pay it back to him. That it was so charged to the firm and subsequently paid back to him is shown by the eighth finding (Rec., p. 24). That these payments were settlements in behalf of the debtor, and not *purchases* of the claims by Munsuri, is not only demonstrable from the foregoing facts, but Munsuri, in the foregoing statement in his petition, admits that his purpose and intent were, not to be a purchaser of the claims, but to settle them for the firm and have the firm refund the money. Any claim that he was a "purchaser" is set at rest by the binding effect of the eighth finding, which distinctly holds that it was not a purchase. That finding expressly states that—

> "all of the claims which he had *pretended* to purchase as a third party from the creditors were turned in by him to the firm and credited to him," etc. (Rec., p. 24).

Even if he had intended to purchase the claims, hold them as his own, and stand in the shoes of the creditors against the firm, he could not lawfully have done so. As a partner he could not deal with the claims except in the interest of the firm; morality and the law alike forbid such a transaction.

It is a settled rule governing the relations of partners, as announced by this court in Wheeler *vs.* Sage, 1 Wall., 518, 528, that—

> "each partner is the agent of his copartners in all transactions relating to partnership business, and is forbidden to traffic therein for his own advantage, and if he does, will be held accountable for all profits."

In the case of Easton *vs.* Strothers, 57 Iowa, 506, Easton sued for a balance due on a note of the firm of Strothers & Conklin. The defendants pleaded that Strothers, one of the partners, had purchased the note and was still the owner. The plaintiff claimed that he had paid the note, but by mutual mistake in computation $140 less had been paid than was due. Judgment was rendered for the plaintiff and the court, on appeal from the judgment, says (p. 507):

> "The first question raised is as to the sufficiency of the count of Strother & Conklin's answer setting up a purchase of the note by Strother. It was Strother's duty to take up the note for the firm by payment or compromise as best he could. The amount paid by him became a charge in his favor against the firm. This was all that he was entitled to. He could not by purchase become the owner of a note against the firm. The rule contended for by the appellants would afford a direct temptation to partners to attempt to evade their duty in respect to the firm paper, and speculate therein by first depreciating it, and then buying it. The count of the answer then was not good as showing a purchase."

Under these principles, Munsuri could not be a purchaser of the claims against the firm, except in the firm's interest, and being himself a general partner and liable therefor, the payments by him were payments by the debtors.

In the case of Cobb *vs.* Fogg, 166 Mass., 466, where a stranger to the insolvent firm undertook to effect a settlement for the insolvents under an agreement whereby he was to be reimbursed for his payments to creditors out of the firm assets, any surplus saved to go to a family creditor of the firm, it was held, by the Supreme Judicial Court, that Fogg, who had obtained the note of the insolvent firm from one of its creditors, could

not pose as a purchaser; that he was acting in the interest of the debtor, and because of misrepresentations made by Fogg's agent to the creditor, the settlement was set aside and Fogg required to return to the creditor the note of the insolvent firm which the creditor had put in suit.

If a stranger to the debtor firm could not, under such conditions, be a purchaser, *a fortiori*, a partner in the firm, himself liable, could not be one.

A further significant feature in the case is the fact that the majority of the receipts presented to appellants are receipts *to the firm* and not to Munsuri, showing that they were dealing with an emissary of the firm and not with a stranger. To overcome this, there is added to the receipts, but not signed by the creditors, a note signed in the name of the firm, by one Urrejola, that the receipts were drawn in that form by *mistake* and should have been to Munsuri—a manifest afterthought.

When to these facts and principles is added the consideration that "his private estate," of which Munsuri speaks in the above quoted passage from his petition, as the source from which he intended to pay, was also an asset belonging to these creditors, because of his being a general partner, the attempt to have him masquerade as a "purchaser" becomes grotesque.

The Pretended Settlement Was Fraudulent and Void.

As already stated, the claims of appellants were not disputed, either as to validity or amount; they were overdue at the time of the settlement. Munsuri, who paid the money, was individually liable for them as a general partner; no consideration was given for abating them in amount, and the payments were merely of sums of money less than was due. Upon what theory, then, can these payments be called a settlement? The only ground for such a contention which can plausibly be suggested

upon this record is the fact that at the time there was a proceeding in bankruptcy pending against the firm.

Assuming that that fact created a situation which made the claims the proper subject of "settlement" by the debtor at less than their value, the question is then presented whether that settlement was fairly obtained or whether it was achieved by fraud on the part of the debtor. In view of the findings of fact, an extended discussion of this question seems to be unnecessary.

The details of the fraudulent conduct of the debtors have been fully set forth in the statement and need not be repeated. The findings show that the fraudulent manipulations of the accounts, the fictitious declaration of profits by which the indebtedness to the firm of the solvent partner, Munsuri, had been extinguished without payment, and the other frauds on which the false inventory of assets and liabilities was based were concealed from the appellants, while Munsuri's own relations to the firm were not only concealed but were actively misrepresented by him, and the false inventory was used by him to mislead the appellants and induce them to enter into the settlement.

The fraudulent character of these concealments and misrepresentations is intensified by the fact that they were obviously the culmination of a conspiracy to defraud which had been designed a year before. Thus, Munsuri, in his petition before the referee in the fourth paragragh, speaking of the condition of the firm, says (Rec., p. 8):

"That in the years 1902–3 the said firm, Successores de José Hernaiz & Co., were seriously involved in their business," yet it was in 1902 that the dividend of fictitious profits of over $25,000 was declared and used with other fraudulent book entries to extinguish Munsuri's own debt to the firm of over $22,000. And the court

below, in its opinion holding Munsuri to be a general partner, finds that Munsuri himself was responsible for that act, saying (Rec., p. 5):

> "Further, it appears that at a time when the concern was insolvent, *this man Munsuri induced the declaring of a dividend* to himself and the said Trueba of almost twenty-five thousand dollars."

The court, in the same opinion, holds Munsuri responsible for the heavy purchases of merchandise immediately following those transactions, saying (Rec., pp. 5–6):

> "The letter books show that Munsuri went to the States in the *summer or fall of 1902* and had the general partner write letters to many wholesale houses in New York, *all of whom are now creditors as a result of the purchases then made.*"

As already pointed out, these purchases by this insolvent firm, engaged in the fraudulent acts established by the findings, brought up their merchandise account from $14,000 in April, 1902, to $98,000 in February, 1903, and during this same time over $75,000 of the stock was sold without profit. When, therefore, in April, 1903, the firm instituted, in the San Juan District Court, the suspension of payments proceedings, fixing June 4, 1903, for the meeting of creditors and filed the false inventory of assets and liabilities, can it be doubted that the purpose was to create a panic among the creditors to aid in bringing them to terms?

That a settlement secured by fraud is not binding, and may be set aside, is so elementary a principle of law that citation of authority is needless.

And it is respectfully submitted that upon the findings in this case the evidence of fraud is overwhelming.

The court below, after approving and adopting as its

own, the findings of fact by the referee, and without making any new findings, held the evidence insufficient to establish fraud. The facts are set out in the findings and the severe strictures upon some of them by the court below in its opinion on the question whether Munsuri was a general partner are also in the record. In the opinion of counsel the moral character of those acts of the debtors as fraudulent or honest is not arguable.

The Suggestion of Laches.

The court below, in its fourth conclusion of law, holds appellants barred by inexcusable laches (Rec., p. 32) and in its opinion discusses the same question (Rec., p. 33). It is not clear to counsel whether the idea of laches imputed by the court to appellants, referred to a period of delay, or to negligence or inattention. That the court was laboring under some confusion of ideas as to the facts with which it was dealing is apparent. Neither the referee nor the court makes any finding of fact as to either delay or negligence, and the record, it is respectfully submitted, indicates neither.

The settlements were made, as the findings show, at various times between June, 1903, and December, 1903, and one as late as February 26, 1904 (Rec., p. 23). The appellants began their proceedings by filing their claims May 13, 1907 (Rec., p. 21), less than four years after the earliest settlement. The Code of Civil Procedure, section 1865, is as follows:

> "A mortgage action prescribes after twenty years, and those which are personal and for which no special term of prescription is fixed, after fifteen years."

If the analogy of the statute has any bearing upon the question of time, the appellants could not be said to

have delayed. If the statute is to be disregarded and time to be measured by the circumstances of each case, it is respectfully submitted that no facts are disclosed by the record to indicate that any of the appellants was dilatory. They could only be dilatory after they knew the facts. So far as this record shows they had no knowledge of the facts until the examination of the books and records in this proceeding revealed those facts. Whether they could have sooner discovered those facts is a question of diligence. The court, in its opinion, says that—

> "they settled with him with their eyes open nearly three [*sic*] years ago, and when *every fact that has since been brought out, was staring them in the face*" (Rec., p. 33).

In this the court is clearly in error and contradicts the findings of fact which it had adopted. Those findings distinctly aver that the debtors *concealed* the true facts and fraudulently represented false statements to be true (Rec., p. 24), and they particularly point out that these facts were discoverable only by an examination of the books and records of the firm, and that these were never accessible in the first bankruptcy proceeding, as it never reached the stage where they or the bankrupts themselves were subject to examination (Rec., p. 23). It must also be remembered that the creditors were residents of England and the United States, and that the debtors who were engaged in this conspiracy to defraud them were located in Porto Rico. Under such conditions concealment by the debtors was comparatively easy; discovery, by the creditors, obviously difficult. Furthermore, it appears that both Munsuri and Trueba, in November, 1903, answered the petition in bankruptcy—Munsuri denying his liability as a gen-

eral partner, Trueba denying the acts of bankruptcy and denying that the firm was insolvent (Rec., p. 23).

Both the answers were required to be under oath and both were false. With such barriers in the way, and with so gross a conspiracy to defraud now disclosed, it is submitted that the court below entirely misapprehended the case, and that the suggestion of laches as a bar is without foundation in fact.

It is respectfully submitted that the decree appealed from should be reversed.

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